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**HARVARD LAW SCHOOL
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REPORTS
OF
CASES DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MISSOURI.

F. M. BROWN,
OFFICIAL REPORTER.

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. THOMAS A. SHERWOOD, Chief Justice.

DIVISION ONE.

HON. THOMAS A. SHERWOOD, Presiding Judge.
HON. FRANCIS M. BLACK,
HON. THEODORE BRACE, } Judges.
HON. SHEPARD BARCLAY,

DIVISION TWO.

HON. JAMES B. GANTT, Presiding Judge.
HON. JOHN L. THOMAS,
HON. GEORGE B. MACFARLANE, } Judges.

HENRY W. EWING, Esq., Clerk.
F. M. BROWN, Reporter.

HON. JOHN M. WOOD, Attorney General.

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CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI,

AT THE
OCTOBER TERM, 1890.

(Continued from Volume 103.)

ROGERS *et al.* v. WOLFE, *Appellant.*

DIVISION ONE.

1. **Contract: PART PERFORMANCE: EVIDENCE.** The acts relied on to show part performance of a contract to convey land, to take it out of the statute of frauds, should be clear and definite and be referable exclusively to the contract, and the latter must be established by competent evidence to be clear, definite and unequivocal in all its terms.
2. ———: ———: ———. The evidence in this case reviewed and *held* not to meet the requirements of the foregoing rule.
3. ———: ———: **HUSBAND AND WIFE: IMPROVEMENTS.** A husband is bound to support and maintain his wife after marriage, and a promise to do so affords no consideration for a contract on her part to convey her lands to him, and such marriage will even cancel all claim on his part for improvements made on the land by him, under the alleged contract.

(1)

104	1
108	263

104	1
140	303

104	1
150	597

104	1
81a	75

104	1
91a	98
91a	547

104	1
170	1701
172	1 48

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4. **Error: WAIVER.** A party not appealing cannot complain of error.
5. **Specific Performance: PARTIES.** The infant heirs of one charged to have agreed to convey land are necessary parties to an answer in ejectment setting up such contract and asking specific performance.
6. **Practice: INFANTS: NEXT FRIEND.** The trial court should appoint a next friend to protect the interests of such infants, and it is error not to do so.

Appeal from Jasper Circuit Court.—W. M. ROBINSON,
Esq., Special Judge.

AFFIRMED.

W. H. Phelps and E. O. Brown for appellant.

(1) Where one in pursuance of, and on the faith of, an oral promise of the owner, that he shall have a deed for land, has changed his condition, entered into the possession of the land, made valuable and permanent improvements, incurred obligations, paid taxes, and expended time, labor and money on account thereof, the case is taken out of the statute of frauds, and equity will compel a specific performance of such promise against the heirs of the promisor. *Sutton v. Haydon*, 62 Mo. 101; *West v. Bundy*, 78 Mo. 407; *Anderson v. Shockley*, 82 Mo. 250; *Hiatt v. Williams*, 72 Mo. 214; *Sharkey v. McDermott*, 91 Mo. 647; *Carney v. Carney*, 95 Mo. 353; *Daugherty v. Horsel*, 91 Mo. 161; *Bank v. Fife*, 95 Mo. 119; *Dozier v. Matson*, 94 Mo. 328. (2) Where, as in this case, there has been possession taken by one having no title, with the consent of the owner, the necessary inference is, that such possession is in conformity to some contract between the owner and the party taking possession. *Sutton v. Shipp*, 65 Mo. 298; *Franklin v. Truckerman*, 27 N. W. Rep. (Iowa) 759; *Despain v. Carter*, 21 Mo. 331. (3) Defendant took possession of the land in question as owner and his acts

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in taking possession and making improvements were such as cannot, rationally, be presumed to have been done had he not considered himself in that light. And the subsequent marriage of Eunice A. to the defendant does not raise a presumption against the contract claimed. The agreement for a deed may be upheld from any facts and circumstances which, in their nature, justify the inference of an understanding between the parties to that effect. *Koch v. Hebel*, 32 Mo. App. 103; 2 Story Eq. Jur., secs. 761, 762, 763; *Davenport v. Mason*, 15 Mass. 93. (4) The plaintiffs, Frank I. and Albert Bull, being minors at the time of the commencement of this action, and the rendition of judgment therein, and not having a guardian or next friend, had no standing in this court, and no legal capacity to sue. R. S., sec. 3469; *Robinson v. Hood*, 67 Mo. 660. The objection to plaintiffs' want of capacity was made by defendant's answer. (5) The trial court committed manifest error in permitting plaintiffs to read, in evidence, over defendant's objection, the record of suits commenced by the collector against E. Rogers *et al.* for delinquent taxes, and the payment of cost, and taxes in such case by F. Rogers. (6) The court below erred in refusing to permit defendant (who offered himself for a witness for that purpose) to deny and contradict certain statements attributed to him by the plaintiff, Alice Rogers, and witnesses, Sanders and Lazenby.

Thomas & Hackney for respondents.

(1) The rule is well settled that before specific performance of a parol agreement to convey lands will be decreed, the contract itself, in all its terms, must be clearly established by positive proof. *Underwood v. Underwood*, 48 Mo. 530; *Sitton v. Shipp*, 65 Mo. 302, 303, and cases cited; *Paris v. Haley*, 61 Mo. 459; *Taylor v. Williams*, 45 Mo. 83, 84; 1 Story Eq. Juris. [10 Ed.] sec. 764; *Cox v. Cox*, 29 Pa. St. 375; *Brewer*

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v. Wilson, 17 N. J. Eq. 180; *Cooper v. Carlisle*, 17 N. J. Eq. 525; *Lobdell v. Lobdell*, 36 N. Y. 327; *Johnson v. Johnson*, 19 Iowa, 74. And this proof must be beyond a reasonable doubt. *Berry v. Hartzell*, 91 Mo. 136, 137, and cases cited. (2) Appellant's evidence of the alleged contract and its terms consists wholly of loose declarations of his deceased wife, made, if at all, to persons in casual conversation from twelve to seventeen years before the trial. Evidence of such declarations is entitled to but little weight and should be cautiously received, and never amounts to positive proof of the facts claimed to have been admitted by those declarations. *Johnson v. Quarles*, 46 Mo. 427; *Underwood v. Underwood*, 48 Mo. 531; *Ringo v. Richardson*, 53 Mo. 385; *Woodford v. Stephens*, 51 Mo. 443; *Modrell v. Riddle*, 82 Mo. 36; *Berry v. Hartzell*, 91 Mo. 136; *Cooper v. Carlisle*, 17 N. J. Eq. 525. (3) Even though appellant and Mrs. Crum entered into the alleged contract in 1870, still their marriage one year afterwards wholly abrogated and extinguished the contract. Kelly on Cont. Mar. Wom., p. 20; 2 Kent, Com. [11 Ed.] top p. 107, side p. 129; 2 Story, Eq. Juris. [10 Ed.] sec. 1370; *Smiley v. Smiley*, 18 Ohio St. 543; *Long v. Kinney*, 49 Ind. 235. (4) The character of appellant's possession was insufficient to take the case out of the statute of frauds. During the first year appellant boarded with the owner of the land on the premises. After that time his possession was that of husband. When possession and part performance are relied on to establish the parol agreement, such possession and the acts done thereunder must be clearly referable to the contract, and inconsistent with any other agreement or relation than the one alleged. *Underwood v. Underwood*, 48 Mo. 529, 530; *Silton v. Shipp*, 65 Mo. 303; *Phillips v. Thompson*, 1 Johns. Ch. 131; 1 Story, Eq. Juris. [10 Ed.] sec. 764; Brown on St. Frauds [3 Ed.] secs. 454, 474; *Frye v. Shepler*, 7 Pa. St. 91; *Rankin v. Simpson*, 19 Pa. St. 471; s. c., 57 Am. Dec. 670; *McMurtrie v. Bennette*,

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1 Harr. (Mich.) 124; *Wible v. Wible*, 1 Grant, Cas. (Pa.) 406; *Blakeslee v. Blakeslee*, 22 Pa. St. 237. In *Zimmerman v. Wengart*, 31 Pa. St. 405, the court affirms the above case and say that, where a party lets go his equities under which he entered, no chancellor will enforce specific performance. Appellant never took possession of the land as owner. There being a mixed possession the legal seizin followed the legal title. Tyler on Eject. and Adv. Enj., p. 905; 3 Washburn, Real Prop. [3 Ed.] top p. 117, side p. 485, sec. 8; *Mather v. Church*, 8 Am. Dec. (Pa.) 663. (5) Appellant was not entitled to any compensation for the improvements placed upon the premises after his marriage and before Mrs. Wolfe's death. Where the husband makes improvements on his wife's lands during coverture, the law presumes that they are intended for her benefit and as a gift, and he cannot claim compensation from the wife's heirs for such improvements. *Burleigh v. Coffin*, 2 Fost. (N. H.) 118; s. o., 53 Am. Dec. 236; *Marable v. Jordan*, 5 Humph. (Tenn.) 417; 42 Am. Dec. 441; *White v. Hildreth*, 32 Vt. 265; *Washburn v. Sproat*, 16 Mass. 449; *Robinson v. Huffman*, 15 B. Mon. 80; *Corning v. Fowler*, 24 Iowa, 584; Kelly, Cont. Mar. Wom., p. 86, and note 4; Schouler, Dom. Rel., pp. 165, 166; 1 Washb. Real Prop. [3 Ed.] top p. 318, sec. 20, side p. 281. (6) The plaintiffs, Frankie I. and Albert Bull, were unnecessary parties, so far as plaintiffs were concerned, their father, Harry Bull, being entitled to curtesy in the share of their deceased mother. They became necessary parties only so far as the defendant was concerned when he filed his answer praying for equitable relief against them. It was for the defendant and not the other plaintiffs to see that guardians or next friends were appointed for them. Besides, the judgment having been in favor of the infants, it will not be reversed because the infants appeared by attorney. R. S. 1879, sec. 3582; *Robinson v. Hood*, 67 Mo. 661.

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BRACE, J.—This action is ejectment, to recover possession of lots 3 and 4 of the northeast quarter of section 4, in township 29, range 30, in Jasper county. The answer sets up an equitable defense. The plaintiffs are the heirs at law of Eunice A. Wolfe, deceased, formerly Eunice A. Crum. The defendant was her husband when she died. She died seized of said land in fee. The defense set up in the answer is that, by a contract entered into in February, 1870, between the said Eunice A., who was then the widow of Edwin F. Crum, deceased, and the defendant, she agreed to execute a deed to him for the land in suit, in consideration of his agreement to take possession of the premises, cultivate and improve the same, pay off her debts, manage her business, and care for and maintain her during the balance of her life; that the defendant performed his part of said agreement, took possession of the land, made permanent and lasting improvements thereon of the value of \$5,000, paid off the debts of the said Eunice A., managed her business, cared for and maintained her during her life; but that she died without having executed to defendant a deed for said premises, “wherefore defendant prays judgment for the specific performance of said agreement, and that plaintiffs convey to defendant said real estate, pursuant to said contract, and for all other proper relief.”

The court found that the plaintiffs are the owners of the land and entitled to its possession; that the allegations of the answer as to a contract between the said Eunice A. and the defendant are untrue; that the defendant is entitled to the sum of \$490 for improvements placed upon the said premises prior to the marriage of the said Eunice A. and the defendant; and that the monthly rents and profits are of the value of \$30 per month; and rendered the following judgment and decree, from which the defendant appeals: “It is, therefore, considered and adjudged and decreed by the

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court that plaintiffs have and recover of the defendant the possession of said premises, together with the monthly rents and profits of said premises, from and after the date of the judgment, together with other costs, and that a writ of execution with a restitution clause issue therefor, provided, however, that plaintiffs pay to the defendant the said sum of \$490, the value of said improvements, which said sum is made a special charge and lien upon said premises, and, that, if the same is not paid on or before the fifteenth day of August, 1887, the clerk of this court issue a special execution therefor, and that the said land be sold to satisfy the same."

The answer admits that in February, 1870, Eunice A. Crum, widow as aforesaid, was the owner in fee and in possession of the premises sued for.

It appears from the evidence that, at that time, she was living upon the land, her family consisting of herself and a niece, Miss Alice Rogers, one of the plaintiffs, then aged about twelve years; that the land had a house upon it, in which she and her niece lived; that about one hundred acres of it was inclosed by a very indifferent fence; that there was a stable, a well and an orchard on the place, and a small portion of it had been broken, and that the remainder was raw prairie land; that the widow was taking boarders, and renting the land to others, and was thus making a living; that she had some household furniture, two horses and a wagon, three cows and five head of young cattle, and some farming implements; that, in the fall of 1869, the defendant appeared in the neighborhood, representing himself to be a bachelor, and a doctor, bringing with him a bunch of cattle, a yoke of oxen, and a team of horses; that in February, 1870, the defendant, his hired hand and his stock went to Mrs. Crum's to board, and thereafter it became his home and place of business. In the spring and summer of 1870, he seems to have been in control of the farm, except the tillable

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land, which was rented to a man named Maxon, and is found repairing and making new fences and some other improvements, and thereafter continued in possession, managing and controlling the farm, and all outside affairs, in connection therewith, while Mrs. Crum continued in the control and management of the household affairs, assisted by her niece as before, until May, 1871, when the doctor and Mrs. Crum were married after which they still continued to live upon the place; the doctor farming and improving the place, and practicing his profession, and his wife managing the household affairs, until February 28, 1879, when she died.

On the sixth of May following, the defendant sent the following letter to Frederick Rogers, one of Mrs. Wolfe's heirs:

"CARTHAGE, MO., May 6, '79.

'Frederick Rogers.

"DEAR SIR:—I am the husband of the late E. A. Wolfe. I will just say that I have a claim against the estate which the heirs will have to settle. As regards the Crums and Horace Rogers, I will tell you some other time. I am in possession and will hold the same on, as per contract, until settlement is made. Please answer soon and oblige
B. F. WOLFE."

The taxes on the land seem to have been promptly paid, up to the time of the death of Mrs. Wolfe, but by whom does not appear in the evidence. After her death the taxes became delinquent. The defendant employed attorneys, and through them caused suits to be instituted against the plaintiffs, as the heirs of his wife, for such taxes. The plaintiffs, however, paid these taxes afterwards, and he failed to get title in that way. Afterwards, on the fifteenth of August, 1885, the plaintiffs instituted this suit. On the thirteenth day of September, 1886, the defendant filed his second amended answer to plaintiffs' petition, setting up the defense hereinbefore stated, and, on the same day,

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filed an application for a change of venue on the ground of prejudice of the circuit judge. His application was sustained and W. M. Robinson, Esq., was thereupon, by agreement of parties, selected as special judge to try the case. The case came on for trial before such special judge on the third of December, following; was heard, argued, submitted and taken under advisement until the next term. At the next term, on the twelfth of April, 1887, the case was reopened on the motion of the defendant, and he was permitted to introduce the evidence of eight more witnesses. The case was then again argued, finally submitted and resulted in the judgment and decree before recited.

The parol contract attempted to be set up in this case is void by the statute of frauds. The defendant seeks to take it out of the statute by showing performance of the alleged agreement on his part. In order to accomplish this, however, by well-established rules of equity laid down by Judge STORY, and which have frequently received the sanction and approval of this court, "it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract, but that the contract should also be established by competent proofs to be clear, definite and unequivocal in all its terms. If the terms are uncertain or ambiguous or not made out by satisfactory proofs, a specific performance will not (as indeed upon principle it should not) be decreed. The reason would seem obvious enough, for a court of equity ought not to act upon conjecture, and one of the most important objects of the statute was to prevent the introduction of loose and indeterminate proof of what ought to be established by solemn written contracts." 1 Story, Eq. Jur., sec. 764; *Berry v. Hartzell*, 91 Mo. 132; *Silton v. Shipp*, 65 Mo. 297; *Paris v. Haley*, 61 Mo. 453; *Underwood v. Underwood*, 48 Mo. 527.

"There must be satisfactory proof not merely of some agreement leading to acts of part performance, in

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pursuance of which they are done, but sufficient to establish *the particular agreement* alleged. The proof of this point must be satisfactory." *Silton v. Shipp, supra*. And this proof of the agreement should be "of so clear and forcible a nature as to leave no room for reasonable doubt in the mind of the chancellor hearing the cause." *Railroad v. McCarty*, 97 Mo. 214. And there must be like proof that the acts performed refer to and result from that agreement, and are such as would not have been done, "unless on account of that very agreement and with a direct view to its performance." "There must be no equivocation or uncertainty in the case." 1 Johns. Ch. 131; *Silton v. Shipp, supra*; *Emmel v. Hayes*, 102 Mo. 186; *Ells v. Railroad*, 51 Mo. 200.

Applying these rules to the case in hand, it is evident that the defendant failed to make out a case for a decree for the conveyance of the land in question to him by the heirs of Mrs. Wolfe. There is no direct proof whatever of any agreement between Mrs. Wolfe and her husband to convey him the land. Apart from their acts, as hereinbefore set out, the only proof tending to show any agreement at all between them, in regard to the land, consisted, in the main, of casual remarks of Mrs. Wolfe, made by her in narration of past occurrences, and fragments of conversation between her and her husband, overheard by witnesses, who undertook to testify to them years after they were made, when they could not recollect her language, or the connection in which it was used, and, at best, could but give impressions or conclusions as to what she really did say or mean. This evidence is vague, indefinite and, in many particulars, contradictory, and falls far short of showing satisfactorily a positive and definite agreement upon the part of Mrs. Wolfe to execute an absolute deed to her husband for the land for the considerations mentioned in the petition. When all this kind of evidence introduced by plaintiff and defendant is taken into

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consideration, in connection with the ascertained facts in the case, it can hardly be said that it is even probable that such a contract was made. If ever made, it must have been about the time stated in the petition,—February, 1870,—when the doctor and the widow had been acquainted with each other for a very short time; for directly thereafter defendant commenced the improvements which he claims were made under that contract.

That, under such circumstances, such a contract should have been made, is not reasonable. Mrs. Wolfe was a woman in good health, capable of maintaining herself. The only possible consideration she could get under such a contract was her maintenance. That she was then getting, by her work at her home on her farm, and just that, and no more, she was to continue to, and did in fact, get by the same sort of work at the same place until she died. She had no debts to pay. When the doctor got the farm under the contract she would have no business to manage, for that was all the business she had, and when he made the improvements they would have been made on his farm and not on hers. It is not to be believed that a respectable woman of good sense, such as the evidence shows Mrs. Wolfe to have been, would have made such a contract with a comparative stranger to her, as her future husband then was. The probabilities are that defendant was seeking a location suitable for his business, and found such a place at the Widow Crum's; that some arrangement was made between them by which she was to board him and his hands, and he was to make some necessary improvements upon the farm and have the use of it long enough to reimburse him for such improvements; that they worked along under some such indefinite arrangement until they became better acquainted, and, finally, about a year and a half after it was made, they married, and the contract then made at the altar was perhaps the only definite contract that was ever made between them, at

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least it is the only certain and definite one we can find in the light of all the evidence in the case.

By the marriage the defendant became bound for the widow's support and maintenance during her life, and thus removed the only semblance of a consideration from the pretended contract; and, if anything was owing him for improvements theretofore made under the supposed agreement, the marriage canceled the debt. 2 Cord on Rights of Married Women, sec. 890 b, sec. 1580; Schouler on Hus. & Wife, sec. 132; *Smiley v. Smiley*, 18 Ohio St. 543; *Chapman v. Kellogg*, 102 Mass. 246; *Long v. Kinney*, 49 Ind. 235. They lived together as man and wife for some eight years. The defendant seems to have thrived in business from year to year, improved the farm as he had need, making the bulk of all the improvements during the marriage, to which relation and his right of usufruct thereunder his acts in so doing are referable rather than to any supposed contract. *Burleigh v. Coffin*, 2 Foster (N. H.) 118; *Marable v. Jordan*, 5 Humph. 417; Washburn on Real Prop. [3 Ed.] p. 318.

And no presumption of a contract either to deed the land, or to reimburse him for the expense, arises from the making of such improvements. There is some evidence tending to show that Mrs. Wolfe was under the impression that the land was bound for the value of the improvements, and that in view of that fact and of the kindness and affection with which she had been treated by her husband she contemplated making him a deed to the land at some time, and this is about the idea the whole of the evidence gives of her sense of the obligation she was under to deed the land. She never did so, however. This idea is confirmed by a declaration of the defendant just after the funeral of his wife in which he said he expected "a pile of trouble in regard to the place about his improvements," and admitted that he had no contract for pay for such improvements.

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Disregarding this evidence, however, it is certain that on the sixth of May, 1879, when he addressed the letter hereinbefore quoted to Frederick Rogers, one of the heirs of his wife, that the only claim he then thought he had was for pay for improvements, and that the claim that his wife had made a contract to convey to him the real estate for a valuable consideration before their marriage was an afterthought growing out of his situation and had no real foundation in the actual facts of the case. Disregarding all the evidence in the record which defendant claims was inadmissible and to which objection was made, the defendant failed to prove, even by a preponderance of evidence, the contract set up in his answer, and the court committed no error in finding against the existence of such a contract and refusing the prayer for specific performance.

On the pleadings this should have ended the case and judgment of ejectment should have been entered for the plaintiffs. Upon some theory, however, the court charged the land with the value of the improvements made by the defendant before the marriage. This action of the court we regard as erroneous, but from it the adult plaintiffs take no appeal, and they are in no position to ask for a reversal for such error.

One of the grounds upon which the defendant asks a reversal, however, is that two of the plaintiffs were shown by his answer and the evidence in the case to be infants and the court failed to appoint a next friend to protect their interests, and for this reason a reversal is asked. So far as these infants were concerned, their father being a party plaintiff to the suit and entitled to the present possession of their share in fee of the premises as tenant by the curtesy, they were not necessary parties to the adult plaintiffs' action in ejectment. To the cross action, however, set up by the defendant in which he sought equitable relief they were necessary parties, and as he failed in the court below to have a friend appointed to protect their interests, and seeks

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now on appeal to have this error corrected, by a reversal of the judgment against said infants, his request in this behalf on the high plane of equity to which he has exalted himself ought to be granted.

The judgment of the circuit court is, therefore, for this reason only, reversed and the cause remanded, with directions to the circuit court to enter in the case a plain judgment in ejectment for the plaintiffs for the recovery of the possession of the premises, and for the rents and profits as found. All concur, except BARCLAY, J., who dissents as to the disposition that ought to be made of the case.

McDERMOTT V. CLAAS, *Appellant.*

DIVISION TWO.

1. **Mechanic's Lien : PETITION : STATUTE.** A petition to foreclose a subcontractor's lien *held* to sufficiently aver that the account filed with the circuit clerk under Revised Statutes, 1879, section 3176, stated the name of the contractor.
2. ——— : ———. Where a petition states a cause of action, though imperfectly or indefinitely, a general objection to the introduction of evidence at the trial, because it fails to state a cause of action, should be overruled.
3. ——— : ——— : **HARMLESS ERROR.** The supreme court will not reverse a judgment on a merely technical ground not affecting the merits of the cause, because, *e. g.*, the petition failed to aver a fact which the evidence showed to be undisputed.
4. ——— : **ACCOUNT : COMPUTATION OF BRICK WORK.** A lien claim for furnishing and laying a given number of bricks is sufficient, though it does not state whether the bricks were computed by actual count or by wall measurement, and although it does not separate the value of the bricks from that of the sand and lime used in placing them.

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5. ——— : WALKS AND FENCES. Where walks and fences are constructed under one entire contract for the erection of a building, the mechanic has a lien for labor and materials expended on them.
6. ——— : NON REVERSIBLE ERROR. Where in a suit to foreclose a subcontractor's lien, there is no real dispute as to the value of work and materials, the admission in evidence of an acceptance by the owner of the subcontractor's bid is not reversible error.

Appeal from St. Louis City Circuit Court.—HON. L. B. VALLIANT, Judge.

AFFIRMED.

W. F. Smith and D. D. Fassett for appellant.

(1) The claim of appellant that the petition was bad as not stating facts sufficient to constitute a cause of action has been made with sufficient definiteness in the motions for a new trial and in arrest. But even if such claim had been lacking in definiteness as in said motions filed, or not made at all in the case, it would not be lost, but could be made in this court for the first time. *Bateson v. Clark*, 37 Mo. 31 (construing R. S., sec. 2302; *Tapley v. Watson*, 38 Mo. 489; *Iba v. Railroad*, 45 Mo. 475; *McGrady v. Harris*, 54 Mo. 147; *Peltz v. Eberle*, 62 Mo. 177; *Sweet v. Maupin*, 65 Mo. 72, holding among other things that section 2302, Revised Statutes, 1889, cited in part 1 of respondent's brief, has no application to cases where petition does not state a cause of action. *Barrett v. Railroad*, 68 Mo. 65; *Weil v. Greene Co.*, 69 Mo. 286; *Hart v. Wire Co.*, 91 Mo. 415, holding that the statutes of jeofails, etc., do not apply to case where the petition does not state facts sufficient to constitute a cause of action. *McIntire v. McIntire*, 80 Mo. 473. (2) The objection that the petition does not state facts sufficient to constitute a cause of action in a case of this kind is not available in the supreme court. *Hart v. Wire Co.*, 91 Mo. 415; *Sweet v. Maupin*, 65 Mo. 72; *Weil v. Greene*

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Co., 69 Mo. 281. Neither the lien record, nor the pleadings in a lien case, are amendable in material averments, even in the trial courts, after the lapse of the statutory period for filing the lien or bringing the action. *Fury v. Borchler*, 6 Mo. App. 24; *O'Neil v. Hirst*, 11 Phil. Rep. 171; *Mfg. Co. v. Jefferson*, 12 Phil. Rep. 483; *Russell v. Ball*, 44 Pa. St. 54; *Dearie v. Martin*, 78 Pa. St. 55; *Crowe v. Nagle*, 76 Ill. 437; *Knox v. Hilty*, 11 Atl. Rep. 792. (3) In special statutory proceedings plaintiff's right to recover must appear from the facts stated in plaintiff's petition, or statement of his cause of action, and every fact must be stated. *Barrett v. Railroad*, 68 Mo. App. 65; Phillips on Mech. Liens, sec. 21; *Railroad v. Mahoney*, 42 Mo. 467; Green and Meyer's Prac., secs. 447-8, p. 175; Overton on Liens, sec. 571, p. 594; *Foster v. Poillon*, 5 E. D. Smith, 556; *Cook v. Vreeland*, 21 Ill. 431; *Mayson v. Hayward*, 5 Minn. 75; *Bayard v. Malcomb*, 1 Johnson's R. 470; *Bartlett v. Crozier*, 17 Johns., star p. 456; Jones on Liens, sec. 1587; Black on Tax Titles, sec. 262; *Gault v. Soldani*, 34 Mo. 150. (4) An objection to the introduction of any evidence, on the ground that the petition does not state facts sufficient to constitute a cause of action, is proper practice and recognized as saving the objection at all stages. *Grove v. Kansas City*, 75 Mo. 675; *Garner v. McCullough*, 48 Mo. 315; *Andrews v. Lynch*, 27 Mo. 169. (5) The averment which is lacking is a material one. *Whitwell v. Thomas*, 9 Cal. 499. (6) Where the pleadings disclose no cause of action, it is not enough that one was proved. "The effect and meaning of a record depend on the pleadings rather than the proof." "The evidence forms no part of a record—the pleadings the most essential part." *Park v. Keeber*, 37 Pa. St. 351; *Bellanger v. Hersey*, 90 Ill. 70. (7) The court found as a matter of fact that the sidewalk as laid in front of the building was a public sidewalk, thoroughfare or

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highway, and such finding of fact is final, and the supreme court will not entertain the claim of respondent to the effect that the sidewalk was not a public sidewalk in a public street. *Handlan v. McManus*, 100 Mo. 124 (8) It devolves on the plaintiff and not on the defendant in a case where lienable and non-lienable matter is mingled under one charge or contract to separate and distinguish the two, if plaintiff seeks to save himself from the effects of such mingling. *Stephens v. Lincoln*, 114 Mass. 476; *McGinnis v. Boyle*, 123 Mass. 570.

Stark & McEntire for respondent.

(1) The petition stated a cause of action, and was amply sufficient to sustain the finding and judgment of the court charging a lien upon the property of the appellant. *First.* The question raised by the appellant, as to whether the petition in the proper way alleged that the lien as filed named both the owner and contractor, not having been specifically presented to the trial court, will not now be heard. R. S. 1889, sec. 2302; *Sweet v. Maupin*, 65 Mo. 65; *Railroad v. Petty*, 30 Ind. 261. *Second.* If there is any doubt as to the sufficiency of the petition on the point named, the respondent now asks leave to amend it so as to insert the words necessary to supply the formal defect, and to make it conform to the uncontroverted evidence. R. S. 1889, sec. 2114; R. S. 1879, sec. 3583; *Daily v. Houston*, 58 Mo. 361; *Cruchon v. Brown*, 57 Mo. 38; *Mueller v. Kaessman*, 84 Mo. 318. (2) The account as filed is "a just and true account of the demand" as required by the statute. *Hayden v. Wulfging*, 19 Mo. App. 353; *Johnson v. Building Co.*, 23 Mo. App. 546; *Hilliker v. Francisco*, 65 Mo. 598. It itemizes the kinds of brick and the number of each kind, as laid in the wall. In other words, it charges according to wall measurement. *Doyle v. Wurdeman*,

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35 Mo. App. 330; *Kurney v. Wurdeman*, 33 Mo. App. 447; *McLaughlin v. Schawacher*, 31 Mo. App. 365; R. S. 1889, sec. 8863; Laws, 1885, p. 198. (3) The evidence does not show that any charge was made for the bricks laid in the sidewalk. *First*. But such charge would be lienable, inasmuch as the house being a store and dwelling-house, abutting on the street, could not be comfortably used and enjoyed without a front sidewalk, and was included in the plans and specifications submitted by the owner to the contractor and subcontractor to work by. *Pullis v. Hoffman*, 28 Mo. App. 666; *Henry v. Plitt*, 84 Mo. 237. *Second*. Furthermore, the amount of work done in the sidewalk was so insignificant in quantity and value as compared to the whole work, that it would not defeat the lien. *Leisse v. Schwartz*, 6 Mo. App. 413. (4) No error was committed in admitting in evidence the copy of the bid by the respondent, and Fritz's acceptance of it which constituted the contract under which the brick-work is done. *Williams v. Porter*, 51 Mo. 441; *Hilliker v. Francisco*, 65 Mo. 598; *Kling v. Construction Co.*, 7 Mo. App. 410; *Foster v. Wulfsing*, 20 Mo. App. 85; *Holmes v. Braidwood*, 82 Mo. 610. (5) The errors alleged by the appellant in his brief cannot be considered, because the motions for a new trial and in arrest of judgment did not specifically direct the attention of the trial court to them. R. S. 1889, sec. 2302; R. S. 1879, sec. 3774; *Sweet v. Maupin*, 65 Mo. 65; *State ex rel. v. Rucker*, 59 Mo. 17; *Fickle v. Railroad*, 54 Mo. 219. (6) The judgment being clearly for the right party, this court will not disturb it. R. S. 1889, sec. 2303; *Hedecker v. Ganzhorn*, 50 Mo. 154; *Conley v. Doyle*, 50 Mo. 234; *Hoskinson v. Adkins*, 77 Mo. 537; *State ex rel. v. Edwards*, 78 Mo. 473; *Sweet v. Maupin*, 65 Mo. 65.

THOMAS, J.—Godfrey Fritz, in March, 1886, contracted with Charles Claas to erect a three-story, brick

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building on a lot belonging to the latter in the city of St. Louis, and plaintiff, as subcontractor under Fritz, agreed to do and did do the brick work, and this action was brought against Fritz to recover the value of the work, and against Claas to foreclose a mechanic's lien against the building and the lot on which it stood, the amount claimed being \$2,514.

The case was tried by the court without a jury. Judgment went against Fritz personally for \$2,758.70, that being the principal and interest of the demand, and against Claas, fixing a lien on his property and awarding a special *feri facias* against it for the payment of that amount. Claas alone appeals.

I. The first error urged for a reversal of the judgment of the trial court is that the petition does not state facts sufficient to constitute a cause of action, and the appellant's objection to the introduction of any evidence under it ought to have been sustained. Section 3176, Revised Statutes, 1879, requires subcontractors to file with the clerk of the circuit court an account of the amount due him, "with the name of the owner or contractor or both if known to the person filing the lien."

It is insisted that the petition in this case fails to state that the account filed with the clerk gave the name of the contractor and for that reason failed to state a cause of action to foreclose a mechanic's lien in favor of a subcontractor. We do not think the assumption that the petition fails to make this statement is justified by the record. The petition describes the building to be erected and the property on which it was erected, alleges that the appellant owned the property; that Godfrey Fritz was the contractor with the appellant for the erection of the building; that plaintiff made a contract with said Fritz to "do the brick work and furnish the materials for" the building for \$2,514, which work he did and for which said Fritz was still

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indebted to him, none of this sum having been paid. The petition then alleges that "within four months after the completion of the building, he gave notice to said defendant Claas that he claimed a mechanic's lien against the buildings and real estate aforesaid, for the sum aforesaid due, stating also from whom the same was due for the work and labor done and materials furnished by him as aforesaid, and that, unless the said amount was paid within ten days," the plaintiff would file a mechanic's lien on said buildings and real estate; that no part of said sum being paid within four months after said indebtedness accrued, to-wit, on the eighth day of September, 1886, plaintiff filed in the office of the clerk of the circuit court of the city of St. Louis, state of Missouri, "a just and true account of the demand so due him as aforesaid, after all just credits had been given, and also a true description of said real estate whereon said buildings were erected on which the work and labor mentioned were done and materials furnished to, or so near a true description thereof as to identify, the same, claiming that said demand was a lien on said property, together with the name of defendant Claas as the owner of said property, all of which statements were verified by plaintiff by his oath; by virtue of which last-named proceeding plaintiff became entitled to and has a mechanic's lien on and against said real estate, and the buildings and improvements thereon."

We think the petition does state that the account filed by plaintiff in order to obtain the lien gave the name of the contractor. It does not do this in so many words, but that is the effect of what is stated. The petition having stated who the contractor was and that he was indebted to him in the sum of \$2,514, for this work, goes on to state that plaintiff notified appellant that "he claimed a mechanic's lien against the building and real estate for the sum aforesaid due, stating also

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from whom the same was due," and that on the eighth day of September, 1886, he filed with the circuit clerk of the city of St. Louis "*a just and true account of the demand so due him as aforesaid.*"

That the petition alleges that the notice of the lien gave the name of the contractor, there can be no question and when the amount of the account and the name of the party who owes it are given, and then the averment is made that plaintiff filed a "just and true account of the demand so due him as aforesaid" the inference is that not only the *amount* of the account, but *the name of the party* from whom it was due were given. Too much ought not to be left to inference in pleadings on the one hand, nor ought the courts to favor vague and indefinite objections on the other. Here the objection was that the petition did not state a cause of action. The particular objection under discussion was not made in the court below. The court and opposite counsel were left to conjecture what the defect in the petition was. If a petition wholly fails to state a cause of action this general objection is sufficient. R. S. 1889, sec. 2047. But, if the petition states a cause of action imperfectly or indefinitely, this objection will not avail. In that case other methods, such as a motion to make more certain and definite, are provided. *Spurlock v. Railroad*, 93 Mo. 530.

This is a cut-throat practice at best, and it is often used oppressively. Such an objection can be taken by demurrer, but parties choose to remain under cover and spring it on their adversaries at a time when they are least able to defend themselves or parry the blows. However, as everyone ought to know, and must be held to know, when he has stated a cause of action, or failed to state one, he ought not to complain if taken by surprise at an inopportune time. But such an objection, to be available at the trial, must go to the *entire sufficiency* of the petition to state a cause of action, and

cannot avail where it states a cause of action which is indefinite and imperfect in some of its averments. We think, in the case at bar, if there be any defect in the petition, it is simply in not making affirmative allegations, but leaving a material matter to inference alone. This defect cannot be reached by the objection made in this case. It ought to have been made by motion to require plaintiff to make the petition more definite and certain. If that motion had been made, or the objection at the trial had been specific as to this point, the defect could have been remedied by amendment. Objections should be timely and specific.

The evidence in this case showed beyond controversy that the account filed did disclose the name of the contractor, as well as that of the owner of the property. Hence, this objection is simply a technical one. The court ought not to do a vain thing, and it would be a vain thing to reverse and remand this case on this technical ground, simply to give appellant an opportunity to traverse *an unquestionable fact*, a fact that has been once proved, and which appellant on the trial had a right to dispute, but which he did not dispute, and which he knows, and this court knows, would be *conclusively* proved on another trial. On this point the result must always be the same, because the fact involved is of record. *Dailey v. Houston*, 58 Mo. 361; *Cruchon v. Brown*, 57 Mo. 38; R. S. 1839, sec. 2303; *Conly v. Doyle*, 50 Mo. 234.

II. The second contention of appellant's counsel is in these words: "The lien claim and account set forth in the petition was too indefinite, vague and uncertain, and was not a compliance with the law. It did not state whether the brick were actual count or were wall measurement, or what sort of measurement or computation, and it mingled brick and material, such as sand and lime, and also labor, in one undistinguishable sum total."

The account is as follows:

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" ST. LOUIS, May 25, 1886.

"*Mr. Godfrey Fritz to Thomas F. McDermott, Dr.*

"To furnishing and services in laying the following mentioned brick to, on and upon the buildings, improvements and premises above described, as follows :

"One hundred and ninety-four thousand, five hundred and fifty-five merchantable brick,	
at \$11.75 per thousand.....	\$2,286.00
"Fifty-seven hundred and twelve stock brick	
at \$40.00 per thousand.....	\$ 228.00
	<hr/>
	" \$2,514.00

"Said brick being furnished and said services rendered continuously between the thirtieth day of April, 1886, and the twenty-fifth day of May, 1886."

This account is sufficient. *Hilliker v. Francisco*, 65 Mo. 598; *Doyle v. Wurdeman*, 35 Mo. App. 330; *Kearney v. Wurdeman*, 33 Mo. App. 447; *McLaughlin v. Schawacker*, 31 Mo. App. 365; *Hayden v. Wulfsing*, 19 Mo. App. 353; *Johnson v. Building Co.*, 23 Mo. App. 546.

The evident intent in this case was to charge for the brick in the wall, and we can see no more reason for requiring a lienor to give in his account the items of sand, lime, scaffolding and labor, as well as of the number of brick in a wall, than to require the items of clay, water, moulds, kilns and labor in making brick, when sold as brick not in a wall. A thousand loose brick are worth so much, which includes, of course, the materials that enter into them and the cost of making them. So, a thousand brick in the wall are worth so much, including, of course, not only the cost of making, but also the cost of putting them in the wall. The plaintiff filed an account for one hundred and ninety-four thousand, five hundred and fifty-five merchantable brick, at \$11.75 per thousand, and fifty-seven hundred and twelve stock brick, at \$40 per thousand. He furnished the brick and put them in the wall, and notified the

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appellant that he charged \$11.75 per thousand for the merchantable brick and \$40 for the stock brick. Appellant had ample means to show, by remeasurement, that there were not one hundred and ninety-four thousand, five hundred and fifty-five merchantable brick and fifty-seven hundred and twelve stock brick in the building, and that the prices charged for these two classes of brick were too high. But he offered no evidence whatever on this point. The architect and superintendent of the building, employed by appellant, was a witness in the case, and appellant himself also testified, but neither one disputed, nor attempted to dispute, plaintiff's account, either as to the number of brick or their price. Appellant chose to leave the case on this point as made by plaintiff. Hence, *all* the evidence shows that plaintiff did put in the building one hundred and ninety-four thousand, five hundred and fifty-five merchantable brick, worth \$11.75 per thousand, and fifty-seven hundred and twelve stock brick, worth \$40 per thousand. It would be, again, a vain thing for this court to reverse and remand this case for new trial, to give appellant an opportunity to dispute a fact that he once had an opportunity to dispute, but which he failed to dispute.

III. The evidence showed that a part of the brick included in plaintiff's account went into a sidewalk in a public street. Appellant's building was erected on the line of the street and the sidewalk was fifty feet long by thirteen feet wide, adjacent to and along the building.

The contention is that the labor and material expended in building this "sidewalk were non-lienable, and being furnished under one entire contract for one gross sum and inseparable from the lienable material, vitiated the whole claim." The phraseology of this contention shows that it is not tenable. Where walks and fences are constructed under "one entire contract," the mechanic has a lien for the labor and materials

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expended on them. *Henry v. Plitt*, 84 Mo. 237. This labor and material were lienable. Appellant owned the land to the center of the street on which his property abutted, subject to the easement in favor of the public. *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582; *Ferrenbach v. Turner*, 86 Mo. 416; *Rude v. The City of St. Louis*, 93 Mo. 408. Appellant had the walk constructed along and adjoining his lot, either voluntarily, or by direction of the municipal authorities. The work done by plaintiff was accepted by appellant's architect as having been completed according to the plans and specifications furnished the contractor by appellant, and hence this walk must have been included in these plans and specifications. The whole job was let as "one entire contract" to Fritz, and the brick work according to the plans and specifications was sublet to plaintiff. The construction of the sidewalk was included in the contract for the construction of the building. The walk was constructed for the house by the direction of the owner, and it must, therefore, be regarded as appurtenant to the house. In that case the labor and materials expended in its construction are lienable. *Pullis v. Hoffman*, 28 Mo. App. 666; *Leisse v. Schwartz*, 6 Mo. App. 413; *Yearsley v. Flanigan*, 22 Penn. St. 489.

An examination of the authorities relied on by the appellant in his argument in support of the contention under review, with the exception possibly of *Kershaw v. Fitzpatrick*, 3 Mo. App. 575, shows that work and labor expended in the erection of a public building or improving a public street disconnected with any work on adjacent property, were held to be non-lienable. That is not the case here, however, as has been shown. A sale of appellant's lot would carry with it all of appellant's interest in the adjacent street and sidewalk.

IV. During the trial the evidence tended to show that in June, 1886, after plaintiff had completed the work, and after Fritz in some way was looked upon as having

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gotten out of the way, appellant had his architect, Mr. B. F. Meagher, to hunt up the bids of the sub-contractors and among them he obtained a copy of plaintiff's bid for the work he did. The architect wrote across this copy: "This is correct. B. F. Meagher," and sent it to appellant who wrote on the face of it "Accepted. Chas. Claas." This copy of plaintiff's bid was then read in evidence over appellant's objections, and this is assigned for error. The record fails to show the object for which this was offered and read in evidence. As appellant did not contradict or offer to contradict plaintiff's testimony as to the value of his work and materials, and as there could have been but one finding on that point, and as the lien was established by other evidence, which was not contradicted, we cannot perceive what benefit the evidence under review could have been to plaintiff or what injury it could have done appellant. For all practical purposes the facts in the case, while not admitted, are virtually conceded and appellant is here not disputing facts but standing on technicalities for a reversal of the case. None of these could have affected the merits of the action.

The judgment will be affirmed. All of division number 2 concur.

THE STATE *ex rel.* PEMISCOT COUNTY, *Plaintiff in Error*, v. SCOTT *et al.*

DIVISION ONE.

1. **Petition for Review: APPEARANCE.** A petition for review of a judgment, under the act of 1883, amending section 8684, Revised Statutes, 1879 (Laws 1883, p. 125), providing for such review where a defendant has not been summoned as required by law or shall not have appeared to the suit, will not lie where the record shows that the defendant did appear to the suit.

104	26
117	437
104	26
119	666
104	26
125	423
104	26
126	76
126	213
126	226
126	226

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2. **Practice : DEFECTS IN RECORD PROPER.** Defects of a fatal character appearing upon the face of the record proper will be reviewed in the supreme court, even in the absence of a motion for a new trial or in arrest of judgment.
3. **Official Bond : ERASURE OF NAME OF SURETY : SPOILIATION.** The mutilation of the official bond of a county officer by the fraudulent erasure of a name of a surety, after the bond had been signed, delivered and approved by the county court, will constitute no defense to a suit on the bond, since the erasure could not be made by the county, and if made by the surety himself, some county officer, or any third person, it would be only spoliation and would not affect the validity of the bond nor relieve the principal or any surely from liability thereon.

Appeal from Pemiscot Circuit Court.—HON. JOHN D. FOSTER, Judge.

REVERSED.

Chas. P. & J. D. Johnson for plaintiff in error.

(1) The defendants having appeared by attorney at the return term, they waived all informalities in the service and return of the writ of summons. *Bartlett v. McDaniel*, 3 Mo. 55; *Lindell v. Bank*, 4 Mo. 228; *Griffin v. Samuel*, 6 Mo. 50; *Evans v. King*, 7 Mo. 411; *Hembree v. Campbell*, 8 Mo. 572; *Phillebart v. Evans*, 25 Mo. 323; *Schell v. Leland*, 45 Mo. 293; *Miller v. McCoy*, 50 Mo. 15. (2) The final judgment in favor of the plaintiff in error, rendered at the September term, 1884, was regular in all respects, and, being so, cannot be set aside on motion of the defendants filed after the lapse of the term at which it was rendered. R. S. 1879, sec. 3684; Laws, 1883, p. 125; *Hyatt v. Wolfe*, 22 Mo. App. 191; *Harbor v. Pacific*, 32 Mo. 425; *Ashby v. Glasgow*, 7 Mo. 320; *Hill v. City*, 20 Mo. 584; *Brewer v. Dinwiddie*, 25 Mo. 351; *Phillips v. Evans*, 64 Mo. 22; *Jones v. Hart*, 60 Mo. 352. (3) The record shows that there was personal service of summons in the case upon all of the defendants; that

104 26
77a 337
78a 382

104 26
89a 232

104 26
96a *556

104 26
101a *113

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the defendants entered their appearance by attorney, and that the final judgment in favor of the plaintiff in error was rendered by "agreement and consent." Defendants in error, in their so-called "bill in review," tacitly admit that they appeared by attorney, as the judgment recites, but that they did not agree or consent to the rendering of the judgment; as they appeared by attorney they were bound by his acts in the premises. *Barlow v. Steel*, 65 Mo. 611; *Railroad v. Stephens*, 36 Mo. 150; *Davis v. Hall*, 90 Mo. 660; *Franklin v. Ins. Co.*, 43 Mo. 491; *Tuppery v. Hertung*, 46 Mo. 136; *Tip-pack v. Briant*, 63 Mo. 581; *Bradley v. Welch*, 100 Mo. 262; *Gehrke v. Jod*, 59 Mo. 528; *Austin v. Nelson*, 11 Mo. 192; *Kerby v. Charwell*, 10 Mo. 393. (4) The order made by the court at the November term, 1885, setting aside the judgment originally rendered in favor of plaintiff, and the judgment entered in favor of the defendants at the May adjourned term, 1866, should be set aside by this court, and the original judgment rendered in favor of plaintiff at the September term, 1884, should be reinstated by this court. *Hill v. City*, 20 Mo. 584; *Harbor v. Pacific*, 32 Mo. 425; *Jones v. Hart*, 60 Mo. 352.

D. H. McIntyre for defendants in error.

(1) The petition for review, as it is called, and the affidavit to the same, alleged that the securities did not consent to the entry of the judgment of September 13, 1884; plaintiffs' answer denied the allegations of this petition. The court granted the petition of the securities; the judgment does not recite, nor does the record show, upon what particular grounds, but it will be presumed that the court found good and sufficient grounds to base its action upon. *Long v. Long*, 96 Mo. 180; *Overholt v. Vieths*, 93 Mo. 422. (2) The record shows that the securities deny that they agreed to the entry of the first judgment; and this denial implies also a denial

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that the attorney had authority to appear for them; they, therefore, did not appear to the action, and in consequence had a right to set aside that judgment at the next term of the court, even if they had been summoned under article 4, of chapter 33, section 2217, Revised Statutes, 1889. (3) Setting aside a judgment by default is a matter resting very largely in the discretion of the trial court; and appellate courts are not inclined to interfere with the exercise of this discretion. Freeman on Judgments [3 Ed.] sec. 541; *Kribben v. Eckelkamp*, 34 Mo. 480; *O'Fallen v. Davis*, 38 Mo. 269; *Adams v. Hickman*, 43 Mo. 168; *Griffen v. Veil*, 56 Mo. 310; *Tucker v. Ins. Co.*, 63 Mo. 588; *Judah v. Hogan*, 67 Mo. 252. (4) The defendants were securities on a collector's bond; as such, their undertaking should receive a strict interpretation, their liability must be strictly made out, and they have the right to stand upon the very terms of their contract. *Blair v. Ins. Co.*, 10 Mo. 560; *State v. McGonigle*, 101 Mo. 353.

BLACK, J.—This is a suit brought by the county of Pemiscot on the official bond given by the defendant Scott, as collector of that county; the other twelve defendants are his sureties on the bond.

The county obtained judgment at the September term, 1884, of the circuit court, which was the return term of the writ. The judgment contains this recital: "Now at this day come the parties by attorney, and by agreement and consent judgment is rendered against the defendants, in the sum of \$1,536.21."

Nothing further was done until the May term, 1885, at which time eleven of the defendant sureties filed a petition in the cause, called a "bill in review," praying that the judgment be set aside and for leave to answer. This petition for review states that, while the judgment contains a recital that it was entered by the consent and agreement of the defendants, "in truth and in fact these sureties made no such agreement and gave no such consent

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as specified in such judgment;" that petitioners are advised the judgment should have been simply an interlocutory one at that, the return, term ; that the coroner's service of summons is illegal in that it does not show which defendant was first served with a copy of the writ and petition, and does not show that a copy of the writ was delivered to a member of the family of one of the defendants, whose name is stated ; and that they have a meritorious defense in this, that the county court, after the bond had been approved, and without their consent, released one of the sureties. The county filed an answer, and the circuit court at the November term, 1885, set aside the judgment before entered, and gave defendants leave to answer, and accordingly they filed answer to the original petition.

A trial was had in July, 1886, which resulted in a judgment for the defendants declaring the bond "utterly null, void and of no force and effect." This judgment, or rather decree, is based upon a finding of the court therein recited that the bond "was, after its approval, mutilated, defaced and tampered with by the fraudulent erasure of the name of William Wilks, who had signed said bond, as one of the sureties." The county, it seems, filed motions for new trial and in arrest in due time, which were overruled, but filed no bill of exceptions. The case is now before us on writ of error.

1. The petition for a review must have been filed and sustained on the supposition that section 3684, Revised Statutes, 1879, as amended in 1883 (Laws of 1883, p. 125), applies to cases like the one in hand. That section provides for a review, upon a petition filed for that purpose, where there has been a final judgment against a defendant, "who shall not have been summoned, as required by this chapter, or who shall not have appeared to the suit," etc. The record before us does not contain a copy of the return made by the coroner to the writ of summons, so that we have no means of knowing whether the return is good or bad. For all the purposes of this

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case we shall assume that the service was and is defective. But the record shows that defendants appeared to the suit, and a petition for review cannot be sustained in any case where the defendant appeared, either in person or by attorney, no matter what may be the merits of his defense. *Campbell v. Garton*, 29 Mo. 343; *Tennison v. Tennison*, 49 Mo. 110.

The defendants, it is true, say in their petition for review, they did not consent or agree that the judgment should be rendered against them, but they do not dispute the fact that they appeared by attorney. The language used in their petition amounts to an admission that they did thus appear. The statute in question affords the defendant an opportunity to make defense where he has been served with constructive notice, as in case of newspaper publication, and did not appear to the suit (*Jones v. Driskill*, 94 Mo. 190); and in such cases the judgment may be opened upon a proper showing, though the judgment and all prior proceedings are regular. But it was never the intention of the statute to substitute a petition for review for a motion to set aside a judgment for irregularity. No such motion was filed in this case, and the question whether such a motion should be sustained is not before us on this record. The petition for a review utterly fails to disclose a case entitling the petitioners to the relief awarded. Indeed, the facts stated show affirmatively that the petitioners were not entitled to have any relief under the section of the statutes before mentioned. And this we are able to say from the record proper. Defects of a fatal character appearing upon the face of the record proper will be reviewed by this court even in the absence of a motion for new trial, or in arrest. *Sweet v. Maupin*, 65 Mo. 65; *Weil v. Greene Co.*, 69 Mo. 286; *McIntire v. McIntire*, 80 Mo. 470.

On the facts as they are found in the final judgment of the circuit court there is no merit whatever in the defense interposed by the sureties. From these findings

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it appears that the bond was duly delivered and approved by the county court. After it had been approved it was mutilated, defaced and tampered with by the fraudulent erasure of the name of one of the sureties. It is true it does not appear by whom this erasure was made ; but it could not have been made by the county. It must have been made by the surety or some county officer, or some third person. Such conduct on the part of the surety would not release him from liability on the bond. The alteration of a bond by an officer who is by law simply the custodian of it will not affect its validity. The mutilation of an official bond by such an officer or by any third person is spoliation and nothing more, and does not relieve the principal or any surety from liability thereon to the county. *State v. McGonigle*, 101 Mo. 353, and cases cited.

The order of the circuit court made at the November term, 1885, setting aside the former judgment in favor of the county and the subsequent judgment in favor of the defendants are reversed. The petition for review is dismissed, and the judgment first rendered in favor of the county is reinstated. All concur, except BARCLAY, J., who dissents.

SEPARATE OPINION.

BARCLAY, J.—My dissent relates to some of the points of practice involved. They appear of importance enough to justify a few words of comment.

The action is an ordinary one on an official bond. The last judgment of the circuit court was in favor of defendants. The plaintiff then moved for new trial and in arrest, but the motions were overruled. What they contained we know not, or whether any exception was taken to the final disposition of them. There is no bill of exceptions preserving them or any of the evidence at any of the hearings.

The opinion of the majority of this division reviews the record proper and reverses the last judgment,

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because the so-called "bill in review" (upon which the first judgment was vacated) is considered insufficient. It is held that it does not state facts sufficient to warrant the trial court in setting aside the original judgment for plaintiff.

The "bill in review" was filed in a subsequent term to that at which the first judgment was entered. It was essentially a new proceeding, the object of which was to get rid of the prior adjudication. It was met by an "answer" on the part of the county. A hearing followed, and the relief asked in the "bill" was granted. No motion to set aside that result was made or exception taken.

After the first judgment was thus opened, the original cause proceeded. The defendants answered the petition, and, on issues so made, a trial was had and the last judgment in the case reached. That conclusion is to be reversed, for the reasons assigned by my learned associate. Without adverting to any other questions that may suggest themselves, it seems to me that the ruling announced is a misinterpretation of the law in regard to the proper functions of this court.

In a case like this, our jurisdiction is strictly appellate, under the constitution. If the trial court had jurisdiction to render the judgment it assumed to pronounce, this court should not, in a civil case, reverse its action upon any point not brought to the attention of that court. This seems to me the plain meaning and, certainly, the spirit of the code of civil practice. R. S. 1889, secs. 2302, 2114.

In criminal cases the range of review may be somewhat wider. R. S. 1889, sec. 4297. We need not digress to state the reasons for this difference as we are concerned now with the practice in civil cases only.

That a pleading does not state facts sufficient to constitute a cause of action or defense should not, in my opinion, be regarded as a ground for reversal,

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unless the point was made in the trial court and erroneously ruled there.

It may be that the facts, omitted in the pleading, were supplied by evidence, admitted without objection at the trial. If so, the failure to allege them could not possibly constitute an error to the prejudice of the substantial rights of the adverse party. R. S. 1889, secs. 2100, 2303.

If facts, not at first alleged, were thus proven, it would be entirely proper for the trial court to allow them to be added to the pleading by amendment at the hearing under our statute of jeofails. R. S. 1889, secs. 2098, 2014. But if the adverse party, expressly, or by a course of conduct at the trial, waived the necessity of such an amendment, would it be just to hear him, on appeal, to urge that, without the amendment, the pleading is radically defective?

It has been sometimes remarked that errors on the face of the record proper are reviewable here without a bill of exceptions. That notion is traceable to impressions derived from a study of the ancient practice at common law; but, as above expressed, the statement is far too sweeping as applied to civil actions under our code. Some errors, no doubt (as, for example, those involving a total want of power to pronounce the judgment given), may be rectified, on appeal or error, without motions or exceptions in the trial court; but many cases demonstrate that every error in the record proper is not necessarily a ground for reversal.

Even under the English practice it was said that "a writ of error lies for some error or defect in substance that is not aided, *amendable* or *cured* at common law, or *by some of the statutes of amendments or jeofails.*" 2 Tidd's Prac. [3 Am. Ed.] p. 1136.

The want of a material averment in a pleading, if filled, for instance, by admission of the fact by the adversary at the trial, or by uncontested proof there, is

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surely amendable (as has been already shown) under our statutes, and, hence, would not form a proper subject for a reversal even upon common-law principles.

The Missouri precedents to the same general purport need not all be cited. A few will be mentioned to indicate their drift.

It has been held that a failure to reply to an affirmative answer does not warrant reversal where the case has been tried as though a reply were in. See cases cited in *Reed v. Bott* (1889), 100 Mo., at page 69.

And in cases where essential amendments to pleadings were permitted at the trial, but never, in fact, were made, though the proceedings went on without objection, it has been ruled, on appeal, that the incomplete state of the issues gave no good cause to reverse. *Merrill v. St. Louis* (1884), 83 Mo. 244; *Young v. Glascock* (1883), 79 Mo. 574.

But suppose such a case came here on the record proper, showing a judgment unsupported by a paper issue, would it not be quite as correct to reverse for that reason as in the case at bar? If the absence of a paper basis for a judgment is immaterial in the one instance, why not in the other?

This court has held that a general verdict, in a case presenting several distinct causes of action, furnished no reason for a reversal where the error was not called to the notice of the trial court by timely motion. *Sweet v. Maupin* (1877), 65 Mo. 65; *Henry v. Lowe* (1880), 73 Mo. 98.

The theory of our procedure is to require parties to develop their legal positions fully in the court of first instance, and every reasonable intendment is usually made to support the action of the latter. In my opinion the insufficiency of a pleading to support a judgment, which such court had power to render, should be no basis for a reversal here unless distinctly made a point of objection there.

 McCormack v. Sawyer.

This view of the proper scope of appellate review prevails in New York state under a code which ours resembles. *Delaney v. Brett* (1872), 71 N. Y. 78.

The success of the reform in pleading and practice, which our code of civil procedure was intended to secure, must depend, in great measure, on the interpretation which the courts give to its provisions. They should be read and applied in the spirit in which they were framed and which finds, perhaps, its most terse expression in section 2117 (R. S. 1889). It does not seem to me in harmony with that spirit to reverse the judgment of a court, having full jurisdiction to act in the premises, for reasons which may never have been suggested to that court. The code has always appeared to me designed to dispense with such unpleasant surprises to litigants in an appellate court.

It is a matter of regret to me that my brethren hold a different opinion. But my convictions on the subject are so firmly grounded that it has seemed proper to thus express them.

 MCCORMACK, *Appellant*, v. SAWYER.

 DIVISION TWO.

Account Stated, Evidence of. Proof that plaintiff had mailed to defendant a statement of the account between them, that the defendant had admitted its receipt and the correctness of the statement it contained and had stated to plaintiff, "if he was able to pay he would," is sufficient evidence of an account stated to be submitted to the jury.

Appeal from St. Louis City Circuit Court.—HON. G. W. LUBKE, Judge.

REVERSED AND REMANDED.

104	36
53a	269
104	38
54a	550
104	36
74a	288

McCormack v. Sawyer.

THIS case was heard on the following petition and answer :

"William G. McCormack,	}
Plaintiff,	
v.	
"Charles H. Sawyer,	
Defendant.	}

"Plaintiff states that on, to-wit, the twelfth day of December, 1883, defendant was indebted to the firm of Smith, McCormack & Co. in the sum of \$14,941.60 for money then found to be due from said defendant to said Smith, McCormack & Co., upon an account stated between them; which said sum the defendant then and there promised to pay the said Smith, McCormack & Co.; that on, to-wit, the first day of January, 1884, defendant paid on account of said indebtedness the sum of five thousand dollars (\$5,000) by note of one S. F. Cathings; that the balance of \$9,941.60 and interest from said twelfth day of December, 1883, is still due and wholly unpaid.

"And plaintiff further states that on, to-wit, the twenty-eighth day of March, 1885, said Smith, McCormack & Co. assigned said demand to John R. Christian; that on, to-wit, the twenty-sixth day of May, 1888, said John R. Christian assigned said demand to William G. McCormack, plaintiff.

"Wherefore plaintiff asks judgment against the defendant for the sum of \$9,941.60, together with interest thereon from the twelfth day of December, 1883, at the rate of six per centum per annum, and his costs.

"By CHRISTIAN & WIND,

"His Attorneys."

To which petition the defendant filed the following answer :

"ANSWER OF DEFENDANT.

"*First.* Defendant comes by attorney and leave of court, files this his amended answer to the amended petition of the plaintiff herein, and for his first defense

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to said petition denies each and all allegations therein contained.

"*Second.* Defendant, for second defense to plaintiff's petition, says: That during the year, 1883, the firm of Smith, McCormack & Co., of which plaintiff was a member, was engaged in the business of making contracts for the future purchase or sale of corn, oats, wheat and other produce in the city of Chicago, and state of Illinois; that this defendant was engaged at said time in making contracts for the purchase and sale upon future delivery of corn, oats, wheat and other produce for his customers in the city of St. Louis and state of Missouri, and was doing business in the firm-name of Charles H. Sawyer; that Smith, McCormack & Co., were defendant correspondents at Chicago, and upon his orders had executed for him and had upon their books a large number of said contracts for future delivery during the fall of 1883; that, in the course of the business carried on by said Smith, McCormack & Co. and defendant, it is usual to require customers to margin contracts for future delivery—that is, to deposit a sum of money with the broker or agent having the contract which will indemnify him against loss according to the fluctuation and changes in the market price for the thing contracted for; that Smith, McCormack & Co. were correspondents for the defendant, entered into agreement and contracts whereby they agreed to carry the deals or contracts made for certain of defendant's customers upon the condition that said deals or contracts should be kept by said customers margined, upon the call of defendant or upon the call of Smith, McCormack & Co.; that said agreement was in writing and was in all respects carried out by defendant and by his customers therein referred to; that said Smith, McCormack & Co. further agreed and contracted with the defendant with reference to the deals of one Ogden Fountain whose account was placed by said Smith, McCormack & Co., and charged against this defendant; that said deal

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should be carried to its maturity without any additional margin from defendant or from Ogden Fontain; that on the third of December, 1883, in utter disregard and violation of which said contracts and agreements said Smith, McCormack & Co., without notifying this defendant, closed out all the contracts and deals on their books made or charged to this defendant; that, by reason of this breach of their contract and good faith, this defendant was injured and damaged in the sum of \$10,000, being the amount which would have been due this defendant upon the faithful execution and performance of the said Smith, McCormack & Co., of the two aforesaid agreement and contracts.

"Wherefore defendant prays judgment against plaintiff as a member of the firm of Smith, McCormack & Co., for the sum of \$10,000, interest and costs.

"*Third.* For a third defense to plaintiff's petition states that, during the year 1883, the firm of Smith, McCormack & Co. were engaged in making wagering contracts for their customers on the future state of the markets in corn, oats, wheat and other produce in the city of Chicago and state of Illinois, and while so engaged agreed and contracted to take deals and take wagering contracts in the name of this defendant on the future state of the markets as a part of such agreement, to make settlements with him of all transactions so entered into upon the basis only of the ——— in the state of the markets at the time of making and closing out such deals without any actual delivery of the produce bought or sold through their intervention.

"That the alleged account sued on by plaintiff arose solely out of transaction so entered into by said Smith, McCormack & Co. in the course of their aforesaid business.

"That defendant expressly repudiated all of the transactions and contracts so made and entered into by said Smith, McCormack & Co.; that plaintiff, in this suit, well knew the nature of the dealings between

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Smith, McCormack & Co. and this defendant, and the full particulars of the creation of the alleged claim of Smith, McCormack & Co. at the time and before the alleged assignment thereof to plaintiff.

"All of which matters defendant answers as a complete bar to any right of recovery in this suit.

"H. W. BOND,

"R. L. McLAREN,

"Attorneys for Defendant."

To which plaintiff filed the following replication :

"Plaintiff, for his replication to the new matter in defendant's answer, denies each and every allegation therein stated.

CHRISTIAN & WIND,

"Attorneys for Plaintiff."

Plaintiff proved the assignment of the account sued on to him; that a copy was in 1883 mailed to defendants; that, in another case, in which the defendant was a party, he testified that he had received the account in due time, and that the same was a correct statement of the transactions between him and Smith, McCormack & Co.

Plaintiff testified that, after the account was mailed to defendant, he saw him a number of times, and they had several conversations in reference to the matter. At these various conversations defendant always said that he did not have any money; that a number of his customers owed him; that his former partner also owed him, and he did not know when he could pay, "and if he was able to pay that he would."

On cross-examination of plaintiff, this question and answer were made: "Q. Mr. McCormack, I am going to ask you this question: Will you swear that Mr. Sawyer ever told you, in any conversation he had with you, that he would pay this account sued on in this case? A. Yes, sir; certainly he did.

"Q. That he would pay it? A. Yes, sir."

Plaintiff then closed his case, when the court sustained a demurrer to the evidence.

McCormack v. Sawyer.

The court, in sustaining the demurrer, said, in substance:

That, to sustain an account stated, it is necessary to prove that the parties agreed that a certain fixed and definite amount was agreed upon as due, and that there was a promise expressly, or by necessary implication, that it would be paid. That mailing an account to defendant, and he saying that he had received it, and that he hoped some day to be able to pay it, falls far short of sustaining such an account. That the parties must agree that the amount stated in the account was correct, and that amount would be paid.

Plaintiff took a nonsuit, with leave.

Christian & Wind for appellant.

(1) The answer is inconsistent, and, to be reconciled, the general denial must be disregarded. The affirmative defenses admit the account. *Bond v. Long*, 87 Mo. 266; *Sheppard v. Starrett*, 35 Mo. 367. (2) The court erred in not permitting plaintiff to read the account to the jury, after proving that a copy had been mailed to defendant. It was not an original paper, and, as the one mailed defendant and the one filed are copies, one is as competent as the other. *Hart v. Robinett*, 5 Mo. 11; *Hughes v. Hays*, 4 Mo. 209; *Barr v. Armstrong*, 56 Mo. 577; *Cross v. Williams*, 72 Mo. 577. (3) The demurrer to the evidence ought not to have been sustained. If plaintiff had simply mailed the account to defendant, and he had kept it an unreasonable time without objection, this would have been sufficient. *Brown v. Kimmel*, 67 Mo. 430; *Hill v. Johnson*, 38 Mo. App. 383; *Hanes v. Page*, 23 Pac. Rep. 961; *Powell v. Railroad*, 65 Mo. 658. But we go much further, and prove conversations in which defendant says, "I can't pay, as I have no money, but would pay if I could." This is equivalent to saying: "Yes, I owe the account; it is all right, but I can't pay it, but will when I get the money."

McCormack v. Sawyer.

Kent v. Highleyman, 17 Mo. App. 9. (4) The court erred in not allowing proof of the copartnership of Fontain, and the statement of Fontain in reference to this account. 1 Greenl. Ev., sec. 112.

Gibson, Bond & Gibson for respondent.

(1) In suits upon accounts stated, "the settlement itself, or rather the defendant's assent in some shape to a balance found due, is none the less essential as the very bottom upon which the rights of recovery rests." *State Line v. Kimmel*, 58 Mo. 85. (2) Proof that the creditor mailed the debtor an account does not, without more, prove an account stated. *Rowland v. Donovan*, 16 Mo. App. 554.

GANTT, P. J.—As will appear from the statement of this case, this is an action for a balance alleged to be due upon an account stated. The petition contains all the allegations essential to a good declaration upon an account stated at common law.

Upon the trial the plaintiff proved the assignment of the account, by Smith, McCormack & Co., to John R. Christian and an assignment by Christian to plaintiff. Plaintiff then proved that a copy of the account, showing the balance sued for, was in 1883 mailed to defendant; that, in another case in which defendant was a party, he testified he had received the account in due time, and that it was a correct statement of the transactions between defendant and Smith, McCormack & Co. Plaintiff, also, offered evidence that, after the account was mailed to defendant, he saw him a number of times and they had several conversations in reference to the matter and defendant said, "if he was able to pay he would." Upon this showing, the circuit court sustained a demurrer to the evidence, and, in so doing, committed manifest error.

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The trial judge is reported in the "*record*" as holding, "that mailing an account to defendant and he saying that he had received it and that he hoped some day to be able to pay it, falls far short of sustaining such an account."

In *Brown v. Kimmel*, 67 Mo. 430, Judge NAPTON, speaking for the court, says: "In a general way an account rendered by a creditor to his debtor, *and not objected to* within a reasonable time, is regarded as evidence of an account stated,—that is, of an account conceded by both parties to be correct."

On the trial plaintiff testified, that on December 15, 1875, he sent the account recited in the petition through the post-office in a letter requesting defendant to sign a note for the balance due him; that no objection has been made to the account by the defendant until the first day of the then term of court, about a week before the trial; that plaintiff and defendant lived in the same town and saw each other three or four times a week. This was all the evidence. The trial court sustained a demurrer to the evidence, and this court reversed the case, saying: "Had the action been on an account stated, there is no question that the evidence tended to establish such an issue in favor of plaintiff."

We have never known the authority of this case questioned, and it is daily invoked in the practice. *Kent v. Highleyman*, 17 Mo. App. 9; *Powell v. Railroad*, 65 Mo. 658. In this case, however, not only was the account delivered to defendant and no objection made thereto, but plaintiff went further and offered direct evidence of a promise to pay it after it was rendered.

For the error in sustaining the demurrer to the evidence and taking the case from the jury, the judgment is reversed and the cause remanded for a new trial. All the judges of this division concur.

 Bedsworth v. Bowman.

 BEDSWORTH *et al.* v. BOWMAN, *Appellant.*

 DIVISION TWO.

1. **Married Woman: SEPARATE ESTATE: EXECUTION.** The separate property of the wife, as defined under the married woman's act (R. S. 1879, sec. 3296), cannot be subjected to the satisfaction of a judgment against the husband *alone*, although the debt for which it was rendered was created by the husband for necessities for the wife and family.
2. ———: ———. Neither a married woman's separate estate in equity nor her statutory separate estate can be charged without her being made a party to the proceeding to enforce said charge.
3. ———: ———. The statutory separate estate is a legal one, and was intended to be proceeded against as such for a debt for necessities, the same as if the wife were a *feme sole*.

Appeal from LaFayette Circuit Court.—HON. RICHARD FIELD, Judge.

AFFIRMED.

Wallace & Childs, Leslie Orear and G. M. Sebree
for appellant.

(1) The court erred in giving the declaration of law, numbered 1, asked for by plaintiffs and objected to by defendant, and in refusing to give the declaration of law, numbered 1, as prayed by the defendant. Sess. Acts, 1875, p. 61; *Woodford v. Stevens*, 51 Mo. 443; *Barnes v. Bangert*, 16 Mo. App. 22; *Alexander v. Lydick*, 80 Mo. 341; R. S. 1879, secs. 3296, 3295; *Sallee v. Arnold*, 32 Mo. 532; *Fisher v. Anchor Line*, 15 Mo. App. 577; *Conrad v. Howard*, 89 Mo. 217. (2) The court erred in overruling defendant's motion in arrest of judgment. R. S. 1879, secs. 3854, 3856. *State ex rel. v. Dunn*, 60 Mo. 64, and cases cited.

Beds'worth v. Bowman.

J. D. Shewalter and S. N. Wilson for respondent.

(1) The property in controversy being the separate estate of his wife (so admitted by the pleadings and shown, without contradiction, by the evidence) she could not be deprived of that property or any title or interest therein without due process of law, and judgment and execution thereon against her husband was no process against her or her property. *State ex rel. v. Armstrong*, 25 Mo. 532; *Gitchell v. Messmer*, 14 Mo. App. 83; *O'Fallon v. Clopton*, 14 Mo. App. 582; *Dugge v. Stumpe*, 73 Mo. 513; Const. Mo., art. 2, sec. 30; *Criley v. Vassel*, 52 Mo. 449. (2) While under the statute the separate personal property of a married woman is liable "for any debt or liability of her husband created for necessities," yet the title to the property is in the wife; and the sheriff being a mere executive officer has no power to go behind the execution and the judgment, and determine the consideration of the judgment, and to settle the judicial question of the existence or non-existence of the exceptional fact which makes the property subject to the payment of the debt which is the foundation of the judgment. The wife is entitled to her day in court, and the only manner in which her separate personal estate can be reached is in equity, or possibly by a suit against both, a judgment against the husband and a judicial determination of the fact by the judgment that it is for necessities. *Kimball v. Silvers*, 22 Mo. App. 520; *Kimm v. Weippert*, 46 Mo. 532; *Whitesides v. Cannon*, 23 Mo. 457; *Gage v. Gates*, 62 Mo. 412; *Martin v. Colborn*, 88 Mo. 229. (3) There was no evidence in this case that the judgment was for necessities; the judgment being on a promissory note, the consideration of the note (though for necessities) was merged in the note. (4) The court did not err in overruling defendant's motion in arrest of judgment. The property in controversy was in possession of the

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plaintiffs under their replevin bond, as was shown by the evidence. R. S. 1879, sec. 3857.

MACFARLANE, J.—This is an action of replevin brought by plaintiffs, who are husband and wife, to recover from defendant the possession of certain personal property, which is alleged to be the separate property of the wife.

The facts, so far as they affect the question at issue are, briefly, as follows: Plaintiff, Louisa Bedsworth, is the wife of her coplaintiff, Lamar Bedsworth, and the property in dispute is the separate property of the wife as defined under section 3296, Revised Statutes, 1879. The husband created an indebtedness for necessities for his wife and the family. A note was afterwards given for the amount of such indebtedness, which was executed by both husband and wife. Suit was instituted on the note against the husband and judgment rendered against him alone. Upon this judgment an execution was issued and placed in the hands of the defendant, who was sheriff of the county of LaFayette, who levied it upon this property. This replevin suit was in the interest of the wife for the possession of the property.

These facts appearing upon the trial, the court directed a verdict for plaintiff and judgment was entered accordingly. An appeal was taken by defendant to the Kansas City court of appeals, where the judgment was affirmed, but one of the judges of said court being of the opinion that the decision was in conflict with the decision in the case of *Alexander v. Lydick*, 80 Mo. 341, the record was certified to this court for its determination of the case.

Waiving altogether the fact that the note was made by both husband and wife, the question for decision is whether the statutory separate personal property of the wife can be subjected to the satisfaction of a judgment against the husband alone, when the debt for which it

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was rendered was created by the husband for necessities for the wife and family.

The statute (R. S. 1879, sec. 3296) provides that the personal property of the wife shall "be and remain her separate property, and under her sole control, and shall not be liable to be taken by any process of law for the debts of the husband." Language more simple, explicit and unambiguous could hardly have been used to express the intention of the legislature. To this part of the act, which defines the rights secured to the wife in this character of property, no room is left for interpretation. Every right of the husband previously existing, not only of disposal but of control, is excluded.

This property, then, having been made the separate property of the wife, she became clothed with all the rights and subject to all the liabilities attending a married woman, who held like property to her separate use before the enactment of the statute. Among these rights was that of obtaining credit on the faith of her separate estate, and among the liabilities was that of having the property charged by a proceeding in equity with the debts thus created, and sold for their satisfaction. That the wife was a necessary party to such a suit, and that a judgment against the husband alone would not bind her or her property, has never been questioned. The proceeding was directed against the property, and designed to divest the wife of her estate therein. Story, Eq., sec. 1397; *Whitesides v. Cannon*, 23 Mo. 457; *Kimm v. Weippert*, 46 Mo. 532; *Davis v. Smith*, 75 Mo. 225.

Indeed, the proposition is not questioned in this case, but counsel for defendant contends that the subsequent portion of the statute qualifies and limits the estate of the wife to such an extent that it does not become a separate estate in its technical common-law sense, but is simply a statutory estate, in which the

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husband has such an interest as enables him to charge it for necessities without the consent of the wife, and enables the creditor to subject it to the payment of his debt under legal process against the husband alone.

So much of the statute as need be quoted is as follows: The personal property of the wife shall "be and remain her separate property, and under her sole control, and shall not be liable to be taken by any process of law for the debts of the husband; * * * but such property shall be subject to execution * * * for any debt or liability of her husband created for necessities for the wife and family."

I am unable to observe any inconsistency between the absolute control of the wife over her property given in the former clause of the section and her obligation to contribute of her means to the support of herself and family in the latter. Prior to this statute the duty of the entire support of the family was imposed upon the husband. To compensate for this exclusive burden, he was entitled to the personal property of the wife absolutely; when he is excluded from all right and interest in the property of the wife, it is but just that the property should be subject to the necessary support of the family. It is very clear that the provision of the statute making the separate property of the wife subject to executions for debts contracted by the husband for necessities was not designed to qualify or limit the rights of the wife or to enlarge those of the husband, but simply to impose on the wife the legal, in addition to the moral, duty of contributing to the family support. The legislature unquestionably intended to vest in the wife the absolute and unqualified right to the use and control of her own property in all respects as other owners, as the husband himself. In respect to property rights the unity growing out of the matrimonial relation was destroyed. The wife was given the same ownership, possession and enjoyment of her property as she would have were she sole and unmarried.

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Emerson v. Clayton, 32 Ill. 493; *Vankirk v. Skillman*, 34 N. J. 114; *Blair v. Railroad*, 89 Mo. 391.

It may have been within the power of the legislature to make provision that the property of the wife, in so far as it might be required in the support of the family, could be taken under process against the husband alone. Such a meaning is so at variance with the evident intent of this act that it cannot be incorporated into it by implication. When all parts of an act are consistent with each other and the intention is plain and unambiguous, we are not at liberty to go outside the law to seek an intent more in accord with our preconceived views than is manifest from the plain terms of the statute itself. *State v. Gammon*, 73 Mo. 421; *State v. Hays*, 78 Mo. 600.

There is nothing remarkable or unusual in the principle incorporated into the law under this legislation, when viewed from an unprejudiced standpoint in regard to the domestic relations. The husband is and ever has been, under certain conditions, liable for any debt created by the wife for necessities for herself and family. Why should not the wife be also for such debts created by the husband? No reason can be given where the wife owns the property. It was never held that the husband had only such a qualified interest in his own property that it could be taken under execution against the wife. To collect, from the husband, a debt contracted by the wife, for necessities, no one would think for a moment of doing by legal process against the wife alone. Formerly the husband was liable for the antenuptial debts of the wife. To satisfy such liability the legal process ran against the husband and not the wife alone. The principle in these cases is not different from the principle recognized and enjoined by this statute.

The wife being vested with the absolute control of her property, free from any interference on the part of the husband, could it be taken from her without due

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process of law? No such construction should be given the statute as would render it of doubtful constitutionality. The rights of protection in the enjoyment of private property is no less sacred because owned by a married woman. "In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession." Cooley, Con. Lim. 436. "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial." Mr. Webster in *Dartmouth College Case*.

Though section 3296 does not declare that the wife shall be notified, yet the law itself will imply that notice must be given as the *sine qua non* of jurisdiction and of judgment. Without notice no one can be passed upon either as to person or estate. *Laughlin v. Fairbanks*, 8 Mo. 367; *Wickham, Adm'r, v. Page*, 49 Mo. 526; *Brown v. Weatherby*, 71 Mo. 152; *Ray Co. v. Barr*, 57 Mo. 290; Wells on Juris., sec. 82.

Though a married woman's separate estate in equity could not be charged in consequence of her note given, unless she be made a party to the proceeding which would seek to enforce the charge created by a decree, so, by parity of reasoning, her statutory separate estate cannot be charged without she be made a party to the proceeding which seeks to enforce such statutory charge. Indeed, the argument is stronger in favor of her being made a party to the latter proceeding than to the former, because in the former it was her own act which makes the charge and lays the foundation for the decree, while in the latter it is done by another person; it may be without her knowledge or consent, and without the existence of the facts necessary to create the charge.

In the states of Iowa, Illinois, Alabama, Pennsylvania and Mississippi are statutes similar to the one under consideration. Though many cases, involving the construction of these statutes, have been reported,

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none has been found in which an attempt was made to charge the wife, or her property, without making her a party and giving her an opportunity to be heard. This argues that the wife is, by the courts of those states, regarded as a necessary party to a suit in which her property rights are involved. In Pennsylvania and Alabama the courts have repeatedly decided that both the pleading and the evidence must show a case of the wife's liability under the statute. *Childress v. Mann*, 33 Ala. 207; *Sawtelle's Appeal*, 84 Pa. St. 311; *Hoff v. Kroerper*, 103 Pa. St. 396. In a case in Iowa, the husband had given his note for necessities, payable at a future day; the court held that the *cause of action* accrued against both husband and wife at the maturity of the note. There was a cause of action against the wife. *Lawrence v. Sinnamon*, 24 Iowa, 80.

If the husband bought a bill of groceries, professedly as necessities for the wife and family, but in reality for another purpose, it might be very doubtful, on general principles, whether he could charge her separate statutory estate for such professed necessities. *Louisiana Bank v. Laveille*, 52 Mo. 380; *Morrison v. Hancock*, 40 Mo. 565; *Deardorff v. Everhart*, 74 Mo. 37.

Not a single precedent, it is believed, can be found in the whole range of equity jurisprudence where a married woman's separate estate has been charged by a decree unless she was made a party to the proceeding, notwithstanding she signed the note and notwithstanding her husband signed it with her. *Riddick v. Walsh*, 15 Mo. 519.

There are as many issuable facts to be determined in a suit to subject her statutory separate estate to sale, under execution for necessities, purchased by the husband for herself and family, as are ordinarily necessary to charge her separate equitable estate, for a debt of her own creating, by a decree of equity. In the former, before her property can be taken under execution, it

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must be shown that a debt was created by the husband ; that it was for necessities, not for the husband, but for herself and family ; and that the estate to be subjected to sale is her statutory separate property.

If the wife is to be deprived of a hearing, who is to be the judge of her liability, the husband, the creditor or the executive officer? The husband may collude with the creditor to subject her property to the payment of his debts, and thereby preserve his own. The property may be taken under process against the husband and disposed of without her knowledge. After her property has been seized under execution, she may not be able to avail herself of the remedies afforded by the law, on account of inability to give the bond required. Her rights and interests alone are to be affected and she is entitled to a hearing before and not after judgment.

While we do not regard it of much practical importance, in view of the present statutes respecting the rights and liabilities of married women, we deem it proper to say that we do not regard the statutory estate of the wife as being of the same character as was her equitable separate estate at common law, which could only be charged by a decree in equity. We are of the opinion that the estate created by the statute was intended to constitute a legal estate, and, for the purpose of charging it for a debt created for necessities, a judgment at law would be binding upon the owner, and the property could be subjected to levy and sale, under execution, to satisfy such judgment, the same as that of an unmarried woman.

Judgment affirmed ; all the judges of this division concur.

Liggett & Myers Tobacco Co. v. Sam. Reid Tobacco Co.

LIGGETT & MYERS TOBACCO COMPANY, *Appellant*, v.
SAM. REID TOBACCO COMPANY.

DIVISION ONE.

1. **Trade-Marks.** A person has a right to the exclusive use of marks, forms or symbols appropriated by him for the purpose of indicating the true origin or ownership of an article manufactured by him.
2. ———. Such designs or symbols are, however, not to be used for the simple purpose of naming or describing the quality of the goods.
8. ———: **INFRINGEMENT: INJUNCTION.** One who has appropriated a trade-mark has a property right in it which will be protected against infringement by injunction.
4. ———: **CASE STATED.** Plaintiff had, for many years, made tobacco, to each plug of which it attached six five-pointed stars made of tin with a hole in the center. After its tobacco had become well known as the "Star" brand, defendant put on the market a "Buzz-saw" tobacco to which is attached a tin symbol of the same size as the plaintiff's with eight points, slightly inclined to the right, a hole in the center and the words "Buzz" dimly impressed on the surface. It is attached to the plug the same as the star of the plaintiff. *Held* that the "Buzz-saw" symbol was an infringement of plaintiffs' trade-mark and that its use should be enjoined.

Appeal from Buchanan Circuit Court.—HON. O. M.
SPENCER, Judge.

REVERSED.

Paul Bakewell and *R. A. Bakewell* for appellant.

(1) It is for the court to compare the marks in a trade-mark case or case of unfair business competition. If to the eye of the court, there is such a resemblance as must have been intended to, or would probably, deceive the ordinary purchaser, an injunction will be

104	53
52a	80
104	53
58a	417
104	53
62a	173
104	53
146	396
104	53
1158	164

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granted. Take the mark first adopted; look at the supposed infringement; put yourself in the place of the ordinary retail purchaser, might you probably, with the care ordinarily used in purchases so insignificant in value on each sale, take the last for the first, not seeing them side by side? If so, the infringement is made out. *Cook v. Starkweather*, 13 Abb. Pr. R. (N. S.) 402; *Edelsten v. Vick*, 11 Hare, 78; 23 Eng. L. & Eq. 51; *Avery v. Meikle*, 23 Alb. L. J. 203; *Taylor v. Taylor*, 23 L. J. Ch. (N. S.) 255; *Lockwood v. Bostwick*, 2 Daly, 251; *McCann v. Anthony*, 21 Mo. App. 23; *Sawyer v. Horn*, 4 Hughes, 239; *Landreth v. Landreth* (1884), 29 Pat. Off. Gaz., p. 1131; *Cope v. Evans*, 18 Eq. Cas. Law Rep. 138. (2) A court may infer a bad intention from a comparison of the two marks, and say that it was not by accident that the coincidence of the two designs was effected. Brown on Trade-Marks [2 Ed.] sec. 386; *Cook v. Starkweather*, 13 Abb. P. 392; *Coffee v. Brunton*, 5 McLane, 256; *Cope v. Evans*, 18 Eq. Cas. Law Rep. 138. (3) The imitation of the original trade-mark need not be exact or perfect. If the court sees that complainant's trade-mark is simulated in such a manner as probably to deceive customers or patrons of his trade or business, the piracy should at once be checked by injunction. The infringement may embrace variations that imitation would not at once disclose. *Filley v. Fassett*, 44 Mo. 168; *Cook v. Starkweather*, 13 Abb. Pr. (N. S.) 402; *Clark v. Clark*, 25 Barb. 79; *Partridge v. Meneck*, How. App. Case, 559; *Burnett v. Phalon*, 5 Abb. Pr. (N. S.) 221. (4) It is not material that the marks are not parallel, nor that seen side by side the two labels would not deceive the ordinary retail purchaser. Brown on Trade-Marks [2 Ed.] secs. 223-4, 267-8, 397; *McLean v. Fleming*, 96 U. S. 245-6; *Gorham Co. v. White*, 14 Wall. 511; *Cook v. Starkweather*, 13 Abb. Pr. (N. S.) 402; *Clark v. Clark*, 25 Barb. 79. (5) Imitators frequently drop part of the surroundings, but, if the peculiar device is so copied as

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to manifest a design of misleading the public, the omission or variation ought to be wholly disregarded. *Brown on Trade-Marks* [2 Ed.] secs. 267, 268, 397; *Walter v. Crowley*, 3 Blatchf. 440-7; *Mfg. Co. v. Trainer*, 101 U. S. 64; *Colman v. Crump*, 70 N. Y. 578; *Cook v. Starkweather*, 13 Abb. Pr. (N. S.) 402. (6) It is not necessary to prove actual fraudulent intent. Intent has no weight in these cases of infringement. *Brown on Trade-Marks*, sec. 188; *Wellington v. Fox*, 3 My. and Cr. 338; *Matrell v. Flanagan*, 2 Abb. Pr. R. (N. S.) 459; *Wiltherspoon v. Currie*, L. R. 508; *Mfg. Co. v. Spear*, 2 Sandf. 599; *Cook v. Starkweather*, *supra*; *Story*, Eq., sec. 951*n*; *High*, *Injunc.*, secs. 676-9, 675*n*, 678*n*; *Cope v. Evans*, L. R. 18 Eq. Cases, 138; *Edelston v. Edelston*, L. R. 14 Eq. 512. (7) It is unimportant on the question of right to relief by injunction, whether the manufacture of defendant is of equal or even inferior quality. *Cook v. Starkweather*, *supra*; *Taylor v. Carpenter*, 11 Paige, 298. (8) But where the manufacture of the infringer is of inferior quality, the injury to the reputation of plaintiff's business by palming off an inferior article as his is to be considered. (9) The transfer of business rights by sale or otherwise passes the trade-mark right. The fact that plaintiffs were originally an ordinary copartnership and became afterwards incorporated does not impair their right or affect its continuity. *Cook v. Starkweather*, 13 Abb. Pr. (N. S.) 402. (10) The fact that defendant has offered no evidence whatever raises a strong inference of intent to deceive on his part. But this may be conclusively inferred from the resemblance of the marks, where no other purpose is affirmatively shown. *Adlerton v. Vick*, 33 Eng. L. & Ch. 51; *Taylor v. Taylor*, 23 L. J. (N. S.) Ch. 255. (11) In the case at bar, actual deception is shown. But this is not necessary where the simulated label is likely to deceive. *Tobacco Co. v. Hynes*, 20 Fed. Rep. 883; *McCann v. Anthony*, 21 Mo. App. 23; *Filley v. Fassett*, 44 Mo. 173; *High*,

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Injunc. 675, 691n; *Moorman v. Hoge*, 2 Sawyer, 78; *Mfg. Co. v. Luderman*, 32 Pat. Off. Gaz., No. 2 (January, 1885); *Cook v. Starkweather*, *supra*. (12) Plaintiff need not show a registered trade-mark. The right is a common-law right, altogether independent of the statute. *McLean v. Fleming*, 96 U. S. 248; *Lee v. Haley*, L. R. 5 Ch. 155; *Filley v. Fassett*, 44 Mo. 168; *Graham v. Plate*, 40 Cal. 593. (13) Courts of equity will with great jealousy protect a manufacturer or trader from unlawful competition in his business, and will override all technicalities to reach justice in such a case. *Perry v. Truefit*, 6 Beav. 66; *Servio v. Provezend*, L. R. 1 Ch. 192; *Avery & Sons v. Meickle*, Pat. Off. Gaz., No. of June 3, 1884, p. 1027; 23 Alb. L. J. 203; *Gamble v. Stephenson*, 10 Mo. App. 581.

Smith & Harrison also for appellants.

(1) The symbol of a "star," as used by the plaintiff to designate, make known and distinguish plaintiff's "star tobacco," is a lawful trade-mark, and should be protected from piracy. A trade-mark is any name, symbol, figure, letter, form or device adopted and used by a manufacturer or merchant to designate the goods he manufactures or sells, and to distinguish them from the goods of another. *Newman v. Alvord*, 51 N. Y. 189; *Upton's Trade-Marks*, 9; 6 *Wait's Actions & Defenses*, 21; *Shaver v. Shaver*, 54 Iowa, 208-210. (2) "The imitation of an original trade-mark need not be exact or perfect. It may be limited and partial. Nor is it requisite that the whole should be pirated; nor is it necessary to show that anyone has in fact been deceived, or that the party complained of made the goods. Nor is it necessary to prove intentional fraud. If the court sees that the complainant's trade-marks are simulated in such a manner as probably to deceive customers of his trade or business, the piracy should be checked at once by injunction." *Filley v. Fassett*, 44 Mo. 168;

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McCartney v. Garnhart, 45 Mo. 593; *Conrad v. Brewing Co.*, 8 Mo. App. 277; *Gamble v. Stephenson*, 10 Mo. App. 581; *Saunders v. Jacobs*, 20 Mo. App. 96; *McCann v. Anthony*, 21 Mo. App. 83; *Fish Co. v. Wooster*, 28 Mo. App. 408-419. (3) The symbol of a "star" affixed upon the tobacco of plaintiff, as shown, points by association in the trade distinctively to the origin of the tobacco to which it is applied, as the plaintiff's tobacco. *Estes v. Leslie*, 29 Fed. Rep. 91; *American Co. v. Anthony*, 5 Atl. Rep. 626; *Mfg. Co. v. Trainer*, 101 U. S. 54; *Union v. Conhaim*, 41 N. W. Rep. 943. (4) The legal test is not whether a wary or cautious man, or one skilled in that particular business, would be likely to be misled by the imitation—but whether it is such as would likely deceive the ordinary purchaser, purchasing with ordinary caution, or the careless and unwary. High on Injunction [3 Ed.] secs. 1088-1089; Sebastian on Law of Trade-Marks [2 Ed.] 121, and cases cited; *Sexio v. Provezend*, L. R. 1 Ch. App. Cases, 192; *Williams v. Spence*, 25 How. Pr. Rep. 366; *Celluloid Co. v. Mfg. Co.*, 32 Fed. Rep. 94; *Glenny v. Smith*, 11 Jur. (N. S.) 964; per Lord CHIELMSFORD in *Witherspoon v. Currie*, L. R. 5 H. L. 508; *In re Farina*, 27 W. Rep. 456; *Barrows v. Knight*, 6 R. I. 434; *McLean v. Fleming*, 96 U. S. 245; *Gorham Co. v. White*, 14 Wall. 511; *Godillot v. Harris*, 81 N. Y. 263; *Coleman v. Crump*, 70 N. Y. 573; *Leidersdorf v. Flint*, 50 Wis. 401; *Clark v. Clark*, 25 Barb. 79, *supra*; *Brooklyn v. Masury*, 25 Barb. 416, *supra*. (5) Nor is the legal test, whether, seen side by side, the two symbols would deceive the ordinary purchaser into mistaking the one for the other, but whether the defendant's tobacco, stamped with its mark and separately exposed for sale would probably be mistaken by purchasers for the plaintiff's tobacco to which its "star" trade-mark is affixed. High on Inj. [3 Ed.] sec. 1088; *Wilson v. Crowley*, 3 Blatch. 440, *supra*; *Lockwood v. Bostwick*, 2 Daly, 521; *Fertilizer Co. v. Woodside*, 1 Hughes C. C. U.

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S. 115; *Mfg. Co. v. Leudeling*, 22 Fed. Rep. 823; *Sexio v. Provezend*, L. R. 1 Chan. App. 192; *Cook v. Starkweather*, 13 Abb. Pr. Rep. (N. S.) 392. (6) The jurisdiction of the courts in trade-mark cases seemed originally to rest on fraud upon the part of defendant; but the test is not whether the offending party intended to commit the fraud, to deceive; but it consists in actual deception or the creation of a possibility of a deception, independent of any actual fraudulent intent. *Delaware v. Clark*, 7 Blatch. 112; *Croft v. Day*, 7 Beav. 84; *Curtis v. Bryan*, 2 Daly, 312; *Messerole v. Tynberg*, 36 How. Pr. Rep. 14; *Lockwood v. Bostwick*, 2 Daly, 521; *McCann v. Anthony*, 21 Mo. App. 83, *loc. cit.* 90; *Coffeen v. Brunton*, 4 McLean, 516. (7) Although the wholesalers or retailers, to whom the defendant may have sold the tobaccos stamped with its mark, may not have been deceived, yet, if the consumer was deceived, the right of action exists and the permanent injunction should be granted. *Sykes v. Sykes*, 3 B. and Cr. 541; *Farina v. Silverlock*, 1 K. & J. 509; *Chappel v. Davidson*, 2 K. & J. 123; *Rose v. Loftus*, 47 L. J. Ch 576; *Mfg. Co. v. Loog*, 18 Ch. D. 412; *Crucible Co. v. Guggenheim*, 2 Brewster, 321-325; *Mfg. Co. v. Wilson*, 2 Ch. D. 434.

M. A. Reed and *Stuart & Carkner* for respondent.

BLACK, J.—This suit was instituted in the Buchanan circuit court to enjoin the defendant from manufacturing, selling or offering for sale plug tobacco having affixed thereto the mark of a star or a mark resembling a star in imitation of plaintiff's trade-mark. On final hearing of the cause the circuit court dissolved the temporary injunction, gave judgment for defendant, and also assessed damages on the injunction bond and gave judgment therefor in favor of the defendant.

From the proofs and admissions made at the hearing it appears the firm of Liggett & Myers had been

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for many years prior to January, 1878, engaged in the manufacture and sale of plug tobacco at the city of St. Louis in this state. The plaintiff corporation was organized under the laws of this state at the last-mentioned date, and became the successor of the firm of Liggett & Myers, and as such successor acquired the business, good will and trade-marks of the old firm. The firm of Liggett & Myers was the first to adopt a star as a trade-mark. It is a symbol in the form of a five-pointed star made of tin, with a circular hole cut through the center. Six of these stars are attached to each plug of tobacco. This brand manufactured by the plaintiff is well and favorably known and has a large sale throughout the United States, and it is called the "Star tobacco."

The defendant, a corporation organized under the laws of this state, began the manufacture of plug tobacco at St. Joseph in December, 1888, long after the plaintiff's trade-mark had become well known to the trade. The defendant adopted a device as a trade-mark of which complaint is made. It is a symbol of the same size as that of the plaintiff, made of tin, with eight points slightly inclined to the right, with a hole in the center, and has the word "Buzz" dimly impressed upon the surface. It is attached to the plugs the same as the star of the plaintiff.

The defendant placed its tobacco upon the market calling it the "Buzz-saw" at a few cents per pound less than the price at which plaintiff sold its brand "Star," and as a result there was a very great depreciation in sales made by plaintiff for five or six months. While experts in the tobacco business would readily detect the difference between the two brands, still it is apparent from an inspection of the tags that an ordinary consumer would not notice the difference. Indeed, there is a vast amount of evidence in the case showing that this "Buzz-saw" was often sold as "Star tobacco," and in

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many instances the consumer purchased and paid for defendant's brand, supposing and believing at the time that he got what he called for, namely, "Star tobacco."

The general principles of the law concerning trade-marks are well settled. A person has a right to the exclusive use of marks, forms or symbols appropriated by him for the purpose of pointing out the true origin or ownership of the article manufactured by him. The limitation upon this right is that such designs or words may not be used for the simple purpose of naming or describing the quality of the goods; for to permit that would be to foster a monopoly, while the great purpose of the law of trade-marks is to protect the owner in the exclusive use of his device which distinguishes his product from other similar articles, and to protect the public against fraud and deception. Any contrivance, design, device, name or symbol may be used as a trade-mark for the purpose of pointing out the true source and origin of the goods to which it is affixed. Under some circumstances the name of a place may be used as a trade-mark.

The law is also well settled that one who has appropriated a trade-mark, to distinguish his goods from other similar goods, has a property right in it, a right that will be protected by injunction against the infringing party. To entitle the plaintiff to a perpetual injunction, the imitation need not be exact or perfect. To constitute an infringement it will be sufficient to show that the imitation is such as would be likely to mislead one in the ordinary course of purchasing the goods and lead him to suppose or believe that he was purchasing the genuine article. It is not necessary to show that any one has in point of fact been deceived, nor is it, at this day, necessary to show intentional fraud. The following cases and many others assert some one or all of the foregoing principles of law : *Filley v. Fassett*, 44 Mo. 168 ; *Mfg. Co. v. Trainer*, 101 U. S. 51 ; *Newman v. Alvord*, 51 N. Y. 189 ; *McLean v. Fleming*, 96 U. S. 245 ;

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McCartney v. Garnhart, 45 Mo. 593; *Hostetter v. Vowinkle*, 1 Dillon, 330; *Shaver v. Shaver*, 54 Iowa, 208.

Applying the foregoing principles of law to the case in hand there can be no doubt but the defendant should be perpetually enjoined from using the so-called "Buzz-saw" device. There is, it is true, some difference between that symbol and the plaintiff's star, but the difference is slight and consists in eight instead of five points, and the eight points incline slightly to the right. At a distance of a few feet they would be readily taken to be one and the same mark. The difference is colorable only, so much so as to indicate even guilty knowledge and a deceptive purpose. Besides this the proof is clear that consumers have been and are often deceived and led to believe that this so-called "Buzz-saw" is genuine "Star."

The defendant's device is but an evasive effort to cover up a wrongful use of the plaintiff's trade-mark. This trade-mark has become of great value to the plaintiff by reason of its long use and the continued excellence of the article to which it is affixed, and the plaintiff is entitled to the exclusive use of it. The defendant has made no appearance in this court and we are at a loss to know upon what ground the court refused the relief prayed for.

The judgment is reversed, and a perpetual injunction will be entered here to the full extent of the relief prayed for in the petition. All concur.

JUDSON *et al.* v. SMITH *et al.*, *Appellants*.

DIVISION ONE.

1. **Statutes : CONSTRUCTION : SUMMARY REMEDY.** Statutes prescribing summary remedies against common law and common right should be strictly construed.

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2. — : — : — : DELINQUENT COUNTY COLLECTOR : DISTRESS WARRANT : INJUNCTION. Where statutes providing for the collection of the revenue require monthly payments to be made by collectors and authorize the issuance of a distress warrant by the state auditor for failure to comply with that requirement, and also require such collectors to make yearly settlements and payments, and likewise empower the state auditor to issue distress warrants against delinquents and their sureties immediately after the delinquency shall occur, the state auditor cannot issue a distress warrant against a delinquent collector and his sureties eighteen months after the collector's term of office has expired, and where it has been so issued injunction will lie to restrain execution.
3. — : — : — : — : — : — : Where the form of a distress warrant given by the statute in such cases is for the collection of the revenue for one year, the warrant cannot be issued for the collection for two years.
4. — : — : — : — : — : — : TRESPASS. The issuance of a distress warrant, under any other circumstances than those authorized by statute, will make the officer issuing it a trespasser.

Appeal from Dent Circuit Court.—HON. C. C. BLAND,
Judge.

AFFIRMED.

John M. Wood, Attorney General, and *E. A. Seay*
for appellants.

While it was the duty of the auditor to immediately issue a distress warrant against Reddick and his sureties, upon ascertaining the amount he owed the state, still the failure of John Walker, the then auditor, to do his duty does not exonerate or discharge the sureties on Reddick's bond. We refer to the following decisions in support of this position : *Parks v. State*, 7 Mo., side p. 195 ; *Daviess Co. v. Sailer*, 63 Mo. 24 ; *State v. Atherton*, 40 Mo. 210 ; *Chew v. Englewood*, 86 Mo. 260 ; *Nolley v. Court*, 11 Mo., side p. 464 ; Murfree on Official Bonds, sec. 56 and note, and sec. 272, and note ; Brandt on Suretyship, sec. 474 ; *U. S. v. Kirkpatrick*, 9 Wheaton, 720. Although Judge HENRY in the case of *Carroll Co. v.*

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Roberts, 68 Mo. 234, quotes the case of *People v. Jansen*, 7 Johns. Rep., with approval, it will be seen by reference to *Sparks v. State*, 7 Mo., side p. 195; *State v. Atherton*, 40 Mo. 210; *U. S. v. Kirkpatrick*, 9 Wheaton, 720, that the rule laid down in the *Jansen* case was overruled and overturned long prior to the date at which the opinion in 68 Mo. was rendered.

L. B. Woodside for respondents.

The distress warrant was issued without any legal authority, and is, therefore, void. (1) The process being extraordinary, the steps leading to it must all have been taken, and the authority to issue it will not be extended beyond the statutory permission. The statute must be strictly pursued, and the ordinary legal intents do not apply in aid of such proceedings, and all the statutory conditions must exist. *Cooley on Taxation* [2 Ed.] p. 719. (2) Sections 7566, 7567 and 7568, General Statutes, 1879, by the pretended authority of which the distress warrant was issued, are not applicable when the term of office of the defaulting officer has expired. *Ray Co. v. Barr*, 57 Mo. 290; *Wimpey v. Evans*, 84 Mo. 148; *Cole Co. v. Dallmeyer*, 101 Mo. 57. (3) If the words "immediately," in section 7568, and "within thirty days," in section 6781, do not mean anything, we are without any statutory regulation as to time in which a distress warrant may issue, and its issuing would be governed by the rules of the common law. At common law, an execution must issue within a year and a day after judgment. 2 Blackstone, Com. [Cooley] book 3, p. 421, side p. 419. And a distress must be made before the expiration of the contract upon which it is based. 2 Blackstone's Com. [Cooley] book 3, 11, side p. 9; 2 Bouvier's Inst., secs. 2450-2470. (4) This distress warrant would not be valid even if the term of office of the collector had not expired when it was issued. *First.* To authorize a distress warrant every step leading

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to it must have been taken and the statute strictly pursued. *Cooley on Taxation* [2 Ed.] p. 719. *Second*. And the warrant must show on its face all the facts which are necessary to authorize it, and show a strict compliance with all the statutory provisions, and be issued in exact accordance with the statute. *Weimer v. Bunbury*, 30 Mich. 219. (5) It was claimed by appellants that the warrant was intended to cover the collections for both years, 1885 and 1886, and if this be correct it was not in compliance with the statutes as the settlement upon each year's tax book was a separate and distinct matter. R. S. 1879, sec. 6772. (6) Injunction is the proper and only remedy in this case. *Fleming v. Walker*, April term, 1890; *Railroad v. Apperson*, 97 Mo. 300; *Bornschein v. Fink*, 13 Mo. App. 120; *Towne v. Bowers*, 81 Mo. 491; *Valle v. Zeigler*, 84 Mo. 214.

SHERWOOD, P. J.—At the November election, 1884, John R. Reddick was elected collector of the revenue of Dent county, Missouri, and gave bond as such collector, and with the plaintiffs as sureties on said bond. His term of office expired March 7, 1887, at which time he was succeeded in office by one J. C. Welch, and he turned over to said Welch all the books of said office and never made any collections after said date. On the tenth of September, 1888, eighteen months after the expiration of Reddick's term of office, John Walker, state auditor, issued a distress warrant against said Reddick and the plaintiffs as his sureties, for the sum of \$3,132.21, together with a penalty of two and one-half per cent. per month on said sum from the seventh day of March, 1887, amounting at the date of the warrant to the sum of \$1,500.

The warrant was as follows:

“STATE OF MISSOURI—ss.

“*The State of Missouri to the sheriff of the County of Dent, Greeting:*

“Whereas John R. Reddick, the collector of the revenue of the county of Dent, aforesaid, for the years

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of our Lord eighteen hundred and eighty-five and six, hath failed and neglected to pay into the state treasury the full amount with which he stands charged on the books of the state auditor of the state of Missouri, and which he ought to have paid into the state treasury, aforesaid, on or before the seventh day of March, in the year of our Lord eighteen hundred and eighty-seven; and whereas the auditor of the state of Missouri has ascertained the balance due the state of Missouri by said John R. Reddick to be the sum of three thousand and one hundred and thirty-two dollars and twenty-one cents, and the said auditor has, according to law, charged the said John R. Reddick, as aforesaid, with the further sum of two and a half per centum a month on said ascertained balance, as aforesaid, to be computed on said balance from the said seventh day of March, eighteen hundred and eighty-seven until the same shall be paid or collected.

“These are, therefore, to command you, in accordance with the provisions of this article, to levy and collect the sum of three thousand, one hundred and thirty-two dollars and twenty-one cents, the balance as aforesaid, ascertained to be due, and the said two and a half per centum a month from the seventh day of March, eighteen hundred and eighty-seven, aforesaid, of the goods and chattels and real estate of the said John R. Reddick and for want of sufficient goods and chattels and real estate to satisfy the aforesaid balance, together with the said per centum thereon, and the fees to the officer collecting the same, you are hereby commanded to levy the same upon the goods and chattels and real estate of James A. Headrick, John E. Organ, L. Judson, J. N. McMurtrey, G. S. Dreckworth, A. H. Clark and H. B. Clark, the securities of the said John R. Reddick.

“You are, also, commanded, that after you have made such levy and collection, you pay the same into the state treasury within thirty days after its transaction,

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unless the first Monday of March next following the date of this warrant shall intervene, and, in that event, then on or before that day, and return this warrant to the office of the state auditor and certify thereon how you have executed the same.

"In testimony whereof, I, John Walker, state auditor of the state of Missouri, have hereunto set my hand and affixed the seal of the auditor's office, in the city of Jefferson, this tenth day of September in the year of our Lord eighteen hundred and eighty-eight.

"JOHN WALKER,

"State Auditor.

"Received December 1, 1888.

"J. L. SMITH,

"Sheriff of Dent County, Missouri."

This warrant was placed in the hands of the sheriff of Dent county on the eleventh day of September, 1888, but nothing was done with it until the nineteenth day of February, 1889, when the real estate of these plaintiffs described in the petition, and of the value of \$6,000, was levied on by the sheriff and was advertised for sale at the April term of the circuit court of Dent county, Missouri.

On the fourth day of April, 1889, plaintiffs presented their petition to the circuit court praying for an injunction against the said sheriff enjoining him from enforcing said warrant against them and selling said real estate thereunder. A temporary injunction was granted, and the cause was continued until the October term, 1889, when, upon trial, the injunction was made perpetual and the sheriff forever restrained from selling the real estate of plaintiffs levied upon under said warrant.

The petition stated substantially the following facts: That Reddick was elected collector of the revenue of Dent county, Missouri, at the November election, 1884; that his term of office expired on the seventh day of March, 1887, at which time he was succeeded in office by J. C. Welch, to whom, at said last-mentioned

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day, he delivered all the books and papers pertaining to said office, and since which time he has not, in any way, discharged any of the duties of said office; that the tax books for the year 1886 were put into his hands for collection and he made settlement thereon with the county court of Dent county on May 4, 1887, from which it appeared that he collected the sum of \$5,824 of state taxes; that nine-tenths of the taxes for said year were collected by said Reddick, before the first day of January, 1887, and one-tenth thereof between the first day of January, 1887, and the first day of March, 1887, after which last-mentioned time he did not collect any money whatever; that no distress warrant had ever been issued by the state auditor to enforce the payment of the money collected by the said collector and no other steps taken to collect the same until the tenth day of September, 1888.

The petition then recites the issue of the distress warrant on September 10, 1888, by the state auditor against the said collector and these plaintiffs for the sum aforesaid, its delivery to the sheriff, J. L. Smith, and that, under said warrant, the said sheriff had, on the nineteenth day of February, 1889, levied on the real estate of plaintiffs (describing it and giving its value), had advertised it for sale on April 4, 1889, at April term of the circuit court, and would sell the same to satisfy the demands of said distress warrant, unless restrained therefrom by the court; that a sale of said lands so levied on by the sheriff under said warrant would cast a cloud on the title of plaintiffs therein and injure plaintiffs, and would be a legal wrong for which no adequate remedy could be had in damages; that the said distress warrant should not be enforced against these plaintiffs for various reasons therein stated, among which were the following: That no due process of law had been had against them in fixing the amount of Reddick's indebtedness to the state or as preliminary to the issuing of said distress warrant, and no opportunity

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had been given then by notice, summons or otherwise to answer to or defend against said claim; that the settlement made by said collector with the county court was erroneous, and he had not collected the amount charged to him therein.

No proceedings as required by law were ever taken to enforce the amount due from said collector by distress warrant in due and proper time. No notice of any kind was given to these plaintiffs, of any indebtedness to the state until the tenth day of September, 1888, and they had no notice of any deficit upon such collections until said last-mentioned time.

The county court of Dent county, Missouri, unlawfully and improperly extended the time of the final settlement of the said collector from the first Monday in March, until the first Monday in May, 1887.

The state auditor acted without authority of law in issuing the distress warrant at the time and in the manner issued, as well as for the amount of the same.

That a large portion, to-wit, the sum of \$5,000 collected by said collector upon the tax of 1886, had been paid to the state.

It was further stated in the petition that plaintiffs were informed that a portion of the amount embraced in the warrant was claimed for taxes collected during the year 1885; and alleging substantially the same reasons why that should not be enforced against them, and closing by the statement that the state auditor acted without authority of law in issuing said warrant at the time it was issued, and for the amount thereof, and praying that the said sheriff be enjoined and restrained from selling said real estate, and for other relief, etc.

The court on presentation of the petition granted a temporary injunction, and continued the cause until the October term, 1889, when the cause was tried. The defendants in their answer justified under, and relied upon, the distress warrant; otherwise their answer was in effect a general denial.

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The evidence showed that the warrant was issued for the amount and at the time stated in the petition and for a penalty of two and one-half per cent. per month on the amount from March 7, 1887; that it was delivered to the former sheriff of said county on the fifteenth day of September, 1888, but no levy was made by him, and he delivered the same to J. L. Smith, the present sheriff and the defendant, on the first day of December, 1888. And on the nineteenth day of February, 1889, said Smith levied on the lands of plaintiff described in the petition, under said warrant, and had advertised the same for sale; that Reddick's term of office expired on the first Monday in March, 1888, when he was succeeded in office by J. C. Welch, and that there were terms of court held in said county as provided by law; that no distress warrant was ever issued against said collector prior to this one, and the plaintiffs were never informed of any delinquency on the part of the collector until the warrant was issued, which was more than a year after he had gone out of office.

It was further shown that Reddick made no collections whatever after he went out of office on the first Monday in March, 1887, and that two-thirds of all taxes collected by him for each year were collected prior to the last of December of such year.

The record of the county court was introduced, showing a term of court held on the first Monday in March of each year, 1886 and 1887, at each of which terms the settlement of the collector was continued until the May term of court; and that the settlement for 1885 taxes was made at the May term, 1886, and for 1886 taxes at the May term, 1887. It was also shown that the collector had paid on his collections, for 1886, \$5,000, and for 1885, \$4,500.

The court made the injunction perpetual, from which judgment the defendants have appealed to this court.

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In order to the proper understanding of the matters involved in this litigation, it becomes appropriate to quote certain statutory provisions on which the defendants herein must rely for the validity of their action in the premises :

These statutory provisions are as follows : "Sec. 6780. Every county collector and *ex officio* county collector, except in the city of St Louis, shall, on or before the fifth day of each month, file with the county clerk a detailed statement, verified by affidavit, of all state, county, school, road and municipal taxes, and of all licenses by him collected during the preceding month, and shall, on or before the fifteenth day of the month, pay the same, less his commissions, into the state and county treasuries, respectively. It shall be the duty of the county clerk, and he is hereby required, to forward immediately a certified copy of such detailed statement to the state auditor, who shall keep an account of the state taxes with the collector.

"Sec. 6781. If any county collector, or *ex officio* county collector, shall fail or refuse to pay the taxes and licenses into the state and county treasuries, as provided in the preceding section, he shall forfeit his commissions thereon, and in addition thereto shall pay a penalty of ten per cent. on the amount thereof, and it shall be the duty of the state auditor to issue a distress warrant for such state taxes and penalties within thirty days, as provided by law. It shall be the duty of the prosecuting attorney to proceed, within thirty days, to collect such county, school, road and municipal taxes, by suit on the official bond of such defaulting collector.

"Sec. 6782. Every county collector shall, on or before the fifteenth day of each month, pay to the state treasurer all state taxes and licenses received by him prior to the first day of the month, as provided in section 6780, and, upon the receipt of such money, the treasurer shall apply the same to the state interest fund to the extent of one-half of such fund charged on the

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current tax books to such collector, and the excess to the revenue fund, and shall execute duplicate receipts therefor, one of which he shall deposit with the state auditor, and the other he shall forward or deliver to the collector, and the auditor shall credit such collector with the sums so paid; and any collector who shall fail to forward by express, bank exchange, or pay the same as herein required, within the time prescribed, shall forfeit to the state the sum of \$200 for each such failure, to be recovered of him or his securities on his official bond; and the state auditor shall direct the prosecution of suit therefor immediately upon such failure, in addition to proceeding by distress warrant for the amount of taxes due, as provided in section 6781; and every collector shall, within thirty days after the final settlement of his account for the revenue and licenses, as provided in section 6772, settle his account with the state auditor, and pay into the state treasury the balance of all revenues and licenses then due the state, after deducting his commissions, and the treasurer shall give duplicate receipts for the amount paid, one of which shall be deposited with the state auditor. The treasurer shall allow to the collector his proper charges for expressage and exchange in remitting the revenue and licenses to him. Upon the settlement of the collector with the auditor, the treasurer shall apportion the balance of the revenue, paid to him by the collector, between the state revenue and state interest fund, so as to make both funds as nearly equal as may be."

"Sec. 7566. All officers and others bound by law to pay money, directly into the state treasury shall exhibit their accounts and vouchers to the state auditor, on or before the first Monday in January in each year, to be audited, adjusted and settled, except the collectors of the revenue, who shall, immediately after their settlement with the county court on the first Monday in March in each year, exhibit their accounts and vouchers to the state auditor to be audited, adjusted and settled;

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and the state auditor shall proceed, without unnecessary delay, to audit, adjust and settle the same, and report to the treasurer the balance found due.

"Sec. 7567. If any of the persons mentioned in the preceding section shall fail to pay the amounts so found due into the treasury within thirty days after the settlement above required, the delinquent shall forfeit to the state the amount of the commission allowed him by law, and also two and one-half per centum a month on the amount wrongfully withheld, to be computed from the time the same ought to have been paid until actual payment, and the auditor shall charge such delinquent accordingly.

"Sec. 7568. The auditor shall, immediately after such delinquency shall occur, issue a warrant of distress against such delinquent and his securities, directed to the sheriff of the proper county, or, if he shall be disqualified to act, then to the sheriff of some adjoining county, who is authorized and required to execute the same, and who, together with his securities, shall be liable on his official bond in the same manner, and to the same extent as if the writ were to be executed in his own county, stating therein the amount due and the penalties and forfeitures thereon accrued.

"Sec. 7569. The distress warrant may be in the following form :

"STATE OF MISSOURI--ss.

"The state of Missouri to the — of the county of —, greeting: Whereas —, the collector of the revenue of the county of — aforesaid, for the year of our Lord eighteen hundred and —, hath failed and neglected to pay into the state treasury the full amount with which he stands charged on the books of the state auditor of the state of Missouri, and which he ought to have paid into the state treasury aforesaid, on or before the —, in the year of our Lord eighteen hundred and —; and whereas the auditor of the state of Missouri has ascertained the balance due the state of Missouri by

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said — to be the sum of — dollars and — cents, and the said auditor has, according to law, charged the said —, as aforesaid, with the further sum of two and a half per centum a month on said ascertained balance as aforesaid, to be computed on said balance from the said —, eighteen hundred and —, until the same shall be paid or collected. These are, therefore, to command you, in accordance with the provisions of this article, to levy and collect the sum of — dollars and — cents, the balance, as aforesaid, ascertained to be due, and the said two and a half per centum a month from the —, eighteen hundred and —, aforesaid, of the goods and chattels and real estate of the said —, and for want of sufficient goods and chattels and real estate to satisfy the aforesaid balance, together with the said per centum thereon and the fees to the officer collecting the same, you are commanded to levy the same upon the goods and chattels and real estate of —, the securities of the said —; you are, also, commanded that, after you have made such levy and collection, you pay the same into the state treasury within thirty days after its collection, unless the first Monday of March next following the date of this warrant shall intervene, and, in that event, then on or before that day, and return this warrant to the office of the state auditor, and certify thereon how you have executed the same. In testimony whereof, I, —, state auditor of the state of Missouri, have hereunto set my hand and affixed the seal of the auditor's office, in the City of Jefferson, this — day of —, in the year of our Lord eighteen hundred and —.

“ — — —, State Auditor.”

There is no canon of construction more rigidly and universally followed than that which requires statutes prescribing summary remedies, remedies in derogation of common law and common rights, to be strictly or literally construed. Touching this point an eminent law-writer says: “A summary distress warrant against

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the collector and his sureties can only be awarded where the bond is in accordance with the statute, and where all the statutory conditions exist. The process being extraordinary and in derogation of the common law, the steps leading to it must all have been taken; and, if it is issued under any other circumstances than those under which the statute gives it, the officer issuing it will be a trespasser. The liability is *strictissimi juris*, and cannot be extended a single step beyond the statutory permission. The same remark may be made of the case of application for judgment on motion. The statute must be strictly pursued, as the ordinary legal intents do not apply in aid of the proceedings in such a case. But, where the statute has been strictly pursued, the summary remedies have been sustained by the courts without hesitation." Cooley on Taxation [2 Ed.] 719, and cases cited. To the same effect, see 2 Desty on Taxation, 762, 763, 1034, 1043.

It only requires a very cursory examination of the warrant issued herein, and the statutory provisions already set forth, to see, at once, that those provisions have not been complied with, either strictly or substantially.

The governing idea of the statute under discussion is the enforcement of prompt payments of the public revenues. Instead, however, of this being done, there was no exaction of monthly payments as required by the statute, nor was the warrant in question issued by the auditor until some eighteen months after Reddick, the collector, went out of office. More than that, the warrant itself does not comply with, nor conform to, the form given by section 7569; because that section is framed for the collection of the revenue but for a *single* year, and not for former years, as is the case with the present warrant.

Section 7566 requires the collector, immediately after his settlement with the county court on the first Monday in March in *each year*, to exhibit his accounts

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and vouchers to the state auditor to be audited, adjusted and settled; and if the collector fail to pay the amount thus ascertained to be due, section 7568 requires the auditor, "*immediately* after such delinquency shall occur," to issue a warrant of distress, etc. But, as already seen, if the warrant be "issued under any other circumstances than those under which the statute gives it, the officer issuing it will be a trespasser."

As showing the strictness with which this court has heretofore regarded similar proceedings it was ruled in *Ray Co. v. Barr*, 57 Mo. 290, that a former clerk of the circuit court could not be proceeded against for the collection of certain fines, etc., which he had retained, in the summary manner provided for in section 5379, Revised Statutes, 1879, after he had gone out of office. So, also, in *Brown v. Weatherby*, 71 Mo. 152, the provisions of section 67, page 81, 1 Wagner's Statutes, it was held that the sureties of a public administrator who was delinquent in his accounts could not be proceeded against in the summary way provided for in that section unless their delinquent principal were proceeded against at the same time.

A similar ruling was made in *Governor v. Powell*, 23 Ala. 579, where it was held that though the statute authorized a summary judgment against the collector and his sureties, yet that, if the collector was dead, the summary remedy was gone.

Applying the rigid principles announced by the foregoing authorities there can be but one opinion as to the patent invalidity of the distress warrant issued in the present instance.

In cases of this sort, cases where the officer who is clothed with such extraordinary authority proceeds in a manner not authorized by the statute which apparently purports to give such powers, the arm of a court of equity is not too short to stay his usurping hand and to arrest and to thwart his assumption of power unconferred. It is true, courts of equity are averse to enjoining

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public officers, especially so where it concerns matters pertaining to the public revenues; but, if public functionaries when acting ministerially exceed the limits of their lawfully constituted authority and jurisdiction, they are not so high nor powerful as to be out of the reach or beyond the control of a court of equity.

This principle has met with frequent exemplification. Thus in *Frewin v. Lewis*, 4 Mylne & Craig, 249, Lord COTTENHAM, said: "The question of jurisdiction was raised, and it was argued by those who supported the demurrers that this court had no jurisdiction. Now, I apprehend that the limits within which this court interferes with the acts of a body of public functionaries, constituted like the "Poor Law" commissioners, are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this court will not interfere. The court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority." This case is cited with approval by Judge STORY. 2 Eq. Juris. [13 Ed.] 259.

High says: "Upon the other hand, if the acts which it is sought to restrain are of a strictly ministerial, as distinguished from an executive or political nature, the fact that they have been committed to executive officers, such as the governor of a state, or a state auditor, will not prevent relief by injunction in a proper case." High on Injunc., sec. 1326.

Pomeroy says: "An injunction will not be granted, in general, to restrain persons from acting as

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public officers ; but the illegal, unlawful or improper acts of public officers may be restrained when they would produce irreparable injury, or create a cloud upon title, or when such remedy is necessary to prevent a multiplicity of suits." 3 Pomeroy's Eq. Juris., sec. 1345 ; *Railroad v. Apperson*, 97 Mo. 300.

These authorities abundantly sustain the action of the circuit court in perpetually enjoining the defendants from further proceeding under and by virtue of the distress warrant, and we affirm the judgment. All concur.

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DIVISION TWO.

1. **Sale: PAYMENT OF PURCHASE PRICE: DELIVERY OF POSSESSION.** On a sale of mules the vendor receiving a small sum of money at the time and a draft for the balance of the purchase price on certain commission merchants to whom he consigned the animals, to be by them delivered to the vendee on payment of the draft and not before, the possession would remain in the vendor and his agents until the purchase price was paid.
2. ———: ———: ———. The retention of the bill of lading by the vendee and the forwarding of the same with the draft to the consignees, of themselves, sufficiently indicated the intention of the vendor to retain the possession and control of the mules until payment of the draft.
3. ———: **FRAUD: RESCISSION BY VENDOR: RIGHT OF STOPPAGE IN TRANSITU.** A vendor who by the contract of sale is to keep the possession of the property sold, until the purchase price is paid, has the right, where the vendee gets possession by improper means, making it tortious, to retake the property and place himself in the position where the contract left him, and this he may do without restoring to the vendee a part of the purchase price paid at the time of the sale.

104	77
71a	681
104	77
75a	63
104	77
78a	88
104	77
86a	72
104	77
92a	11661
104	77
95a	11627
98a	6425
104a	177
101a	6173

4. ——— : ——— : ——— : ——— : STATUTE. Section 2505, Revised Statutes, 1879, has no application to a case where a vendee fraudulently obtains possession of personal property sold before payment of the purchase price and sells it to a third party to whom it is consigned, and the original vendor exercises his right of stoppage *in transitu*, where the contest is between the last purchaser and the carrier for the value of the property which it failed to deliver.
5. ——— : DELIVERY : STATUTE. The latter clause of section 2505, Revised Statutes, 1879, has no application to a sale of personal property where possession was never given to the vendee.
6. ——— : PRINCIPAL AND AGENT : EVIDENCE. The acts, declarations and admissions of an agent in reference to the business of the principal with which he has been intrusted, if made while engaged in its execution, or so soon thereafter as to constitute a part of the transaction, will bind the principal and are admissible in evidence against him.
7. ——— : ——— : ———. When the acts of the agent will bind the principal, his declarations respecting the subject-matter will also bind him, if made at the time.
8. PRACTICE : INSTRUCTIONS. Where a cause has been fairly submitted to the jury under instructions given by the court, nothing more should be required, and the appellate court will not critically examine instructions refused in order to discover one that might appropriately have been given.
9. ——— : PRINCIPAL AND AGENT : FRAUD : EVIDENCE. Evidence that an agent, who bought property from one who had fraudulently obtained possession of it under a contract of purchase, was an old acquaintance of his vendor, that the conduct of the sale was unusual, that the payment by the agent was not according to the usual custom, that when charged with knowledge of the fraud he made no denial, and that, although present at the trial, he was not called as a witness, will justify the submission to the jury of the question whether the agent knew of the fraud.
10. ——— : ——— : ——— : NOTICE. Where the only right a vendor has to the possession of the property sold is a statement fraudulently obtained, knowledge by the agent of the buyer that this statement was false, will prevent his principal from being an innocent purchaser.
11. PRACTICE : INSTRUCTIONS. Instructions embodying abstract propositions of law correct in themselves should not be given when not predicated upon the evidence in the particular case to be determined.

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Appeal from St. Louis City Circuit Court.—HON.
SHEPARD BARCLAY, Judge.

AFFIRMED.

George B. Burnett and George S. Grover for
appellant.

The court erred in overruling plaintiff's objection to the introduction of any evidence by defendant, because, from the averments of the answer, it appears that at the time of the delivery of the mules to Grant he was not entitled to possession of them. By the transaction between Grant and Dennis, the latter became invested with the property in the mules and also with the possession. *State v. Dennis*, 80 Mo. 589. Grant's only right to repossess the mules and the only right defendant had to redeliver them was based upon Grant's right to rescind the sale to Dennis; but the right to rescind depended upon Grant's restoring what he had received on the sale. *Thayer v. Turner*, 8 Met. 551; *Ayers v. Hewitt*, 14 Me. 281; *Fisher v. Conant*, 3 E. D. Smith, 199; *Mason v. Barrett*, 3 Denio, 69; *Stewart v. Dougherty*, 3 Dana, 479; *Keteltas v. Fleet*, 7 Johns. 324; *Kimball v. Cunningham*, 4 Mass. 502; *Jennings v. Gage*, 13 Ill. 610; *Estes v. Reynolds*, 75 Mo. 563; *Bibb v. Means*, 61 Mo. 284; *Melton v. Smith*, 65 Mo. 315. (2) The court admitted improper testimony against the objections of plaintiff. *Rodgers v. McCune*, 19 Mo. 557; *McDermott v. Railroad*, 73 Mo. 516; *Adams v. Railroad*, 74 Mo. 553; *Aldridge v. Furnace Co.*, 78 Mo. 559; *Scovill v. Glasner*, 79 Mo. 449; *Chillicothe ex rel. v. Maynard*, 80 Mo. 185; *Railroad v. O'Brien*, 119 U. S. 90. (3) The court gave improper instructions of its own motion and at the instance of defendant. *First*. The fifth instruction given for the defendant assumes there was evidence

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before the jury from which they might find that Meyers had knowledge of efforts on the part of Dennis to cheat and defraud Grant, and that Meyers knew the possession of the mules had been obtained by Dennis by fraud and deception, whereas there is not a scintilla of evidence in the record to support such a finding. Fraud is never to be presumed, but must be established by proof. *Priest v. Way*, 87 Mo. 13. It is error to give instructions upon a theory which has no evidence to support it. *Gerren v. Railroad*, 60 Mo. 410; Thompson on Charging the Jury, p. 75; *Dowling v. Allen*, 88 Mo. 293. *Second*. The fourth instruction given by the court of its own motion announces the proposition that if Meyers knew Dennis had not paid Grant for the mules, and that he was yet indebted to Grant for the purchase price thereof, then plaintiff was not an innocent purchaser of said mules. (4) The court refused to give proper instructions asked by plaintiff. *Sawyer v. Railroad*, 37 Mo. 241; *Muldowney v. Railroad*, 32 Ia. 176.

Everett W. Pattison for respondent.

The principles upon which the decision of this case rests may be stated as follows: (1) Where, by the terms of the bill of lading, the vendor makes the property deliverable to his own order, or to his agent, this fact is, when not rebutted by evidence to the contrary, almost decisive to show that it was the intention of the vendor to reserve the *jus disponendi*, and to prevent the property from passing to the vendee. 1 Benj. on Sales [Corbin's Ed.] 567, and English cases cited, for American cases see section 578; *Ogg v. Shuter*, L. R. 1 C. P. Div. 47. And for the purposes of this case it makes no difference whether the vendor intends to retain the *jus disponendi* absolutely, or only so long as the purchaser continues in default. *Mirabita v. Bank*, L. R. 3 Exch. Div. 164; *Brunswick Co. v. Martin Co.*, 20 Mo. App. 158.

(2) If the vendor deals with the bill of lading only to secure the contract price, then the property vests in the buyer upon payment or tender by him of the contract price. 1 Benj. on Sales [Corbin's Ed.] 572, and cases cited in note; also 590; *Bank v. Homeyer*, 45 Mo. 145, and cases above cited from 3 Exch. and from 20 Mo. App.; *Welsh v. Bell*, 32 Pa. St. 12. Nor is it necessary that the vendor should declare in express terms that he retains the title. *Stone v. Perry*, 60 Maine, 48. (3) If the price is not paid, and the buyer has obtained possession of the goods, the vendor may regain the same from the vendee or from anyone claiming under him; and it is not necessary to pay or tender back such portion of the purchase money as the vendor has received. *Fleck v. Warner*, 25 Kan. 492; *Duke v. Shackelford*, 56 Miss. 562; *Everett v. Hall*, 67 Maine, 497; Benj. on Sales [4 Am. Ed.] sec. 429, and cases cited; *Robinson v. Baker*, 5 Cush. 137. (4) It is only when the vendor gives to the vendee both the possession of the property and the *indicia* of ownership, that an innocent purchaser for value can hold the property against the original vendor. *Leigh v. Railroad*, 58 Ala. 165, 176. See, also, *McMahon v. Sloan*, 12 Pa. St. 233, cited in 1 Benjamin on Sales [Corbin's Ed.] 449, in which the possession of the property, as well as of the *indicia* of ownership, is recognized as essential. (5) If one claims to hold the goods as an innocent purchaser, it is incumbent upon him to show that he actually paid value for the property. *Young v. Kellar*, 94 Mo. 581; *Paul v. Fulton*, 20 Mo. 156; *Arnholz v. Hartwig*, 73 Mo. 485; *Jewett v. Palmer*, 7 Johns. Ch. 68; *Weaver v. Barden*, 46 N. Y. 286; *Haskins v. Warren*, 115 Mass. 514; *Paton v. Coit*, 5 Mich. 509; *Fosdick v. Schall*, 99 U. S. 235, 250; 25 L. Ed. 342. (6) The transaction in question was pending during the whole of Sunday, January 14, and the statements of plaintiff's agent made at any time during that day were admissible as part of the *res gestæ*. *Singleton*

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v. Mann, 3 Mo. 464; *Bank v. Williams*, 46 Mo. 17; *Robinson v. Walton*, 58 Mo. 384; *Leahey v. Railroad*, 97 Mo. 165; *Boatmen's Ass'n v. Kribben*, 48 Mo. 37. (7)
There was no error in giving or refusing instructions.

MACFARLANE, J.—This is a suit against defendant, as a common carrier, to recover the value of twenty-four mules delivered by plaintiff to it, at East St. Louis, on the fourteenth day of January, 1883, to be carried to the city of Baltimore and there delivered to plaintiff, and which it neglected and failed to do; but on the contrary it carried them to the city of Indianapolis, and there wrongfully delivered them to some person unknown to plaintiff.

The answer was a general denial and a special defense substantially as follows:

The mules were the property of Thomas J. Grant, a resident of Randolph county, Missouri; that one John B. Dennis and William Meyers fraudulently conspired to get possession of said mules, and dispose of them; in order to carry out the scheme of fraud, Dennis went to Grant's farm, in Randolph county, and made a contract for the purchase of said mules upon which a small sum in money was paid, and a draft was drawn on McPike & Johnson, commission merchants, in St. Louis, for the balance; the mules were shipped over the Wabash railroad to St. Louis, consigned to McPike & Johnson, under the agreement that they should be delivered to Dennis, upon payment of the draft, but not before; that, on the day after the mules arrived in East St. Louis, Dennis pretended to sell them to Meyers, who was at the time the agent of the plaintiff, engaged in the purchase of mules for him; that Meyers and Dennis fraudulently obtained possession of the mules from McPike & Johnson without paying the draft, and had them shipped over defendant's road, consigned to plaintiff at Baltimore; that upon being advised of these facts, defendant returned the mules from Indianapolis, which point they

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had reached, and delivered them to Grant at East St. Louis. The reply was a general denial.

The following facts were disclosed by the evidence : Plaintiff, Joseph Bergeman, lived in Baltimore, in Maryland, and had for many years been engaged in buying and selling horses and mules. William Meyers had been his agent in buying mules for fifteen years. McPike & Johnson were live-stock commission merchants at East St. Louis ; Dennis lived in St. Louis and had occasionally bought and sold mules on his own account. Grant was a farmer in Randolph county and also bought, fed and sold mules. Dennis had, previous to January, 1883, on two or three occasions bought small lots of mules from Grant. Dennis was also known to Meyers and McPike & Johnson. On about the twelfth of January, 1883, Dennis went to Grant's home and proposed purchasing twenty-four mules he then had for sale. After some negotiations the price was agreed upon. During the negotiations Dennis spoke of wishing to buy such mules as would suit Meyers. Dennis told Grant that the money was deposited with McPike & Johnson to pay for the mules ; that Meyers had deposited it. Dennis paid \$80 in cash, and gave his draft on McPike & Johnson for balance, \$3,248. The mules were loaded into a car and a receipt or bill of lading of the company was taken which recited that Grant had shipped to McPike & Johnson twenty-four head of mules.

Grant then sent the draft and bill of lading by mail to McPike & Johnson, with the following letter, after the date and address :

"I inclose you a draft for \$3,248, which you will please honor by sending check to me to Randolph Bank at Moberly. The draft is for twenty-four mules sold to John B. Dennis."

The mules were forwarded Friday night, the thirteenth. The draft and letter were not mailed until the next day. After the mules had been loaded, Dennis asked Grant for a statement showing what had been

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paid for the mules, in order that Meyers would know he was not putting up a job on him. Thereupon Grant gave him the following statement, addressed to McPike & Johnson :

“I have this day sold John B. Dennis twenty-four head of mules for \$140 a head.”

The mules were delivered to McPike & Johnson by the railroad company, Sunday morning, January 15, before they received the letter and draft. The statement given Dennis by Grant was shown McPike & Johnson, who were informed that the mules had been sold to Meyers ; thereupon, at request of Meyers, they were forwarded to plaintiff over defendant's road.

After the mules had been forwarded from East St. Louis, in a settlement between Meyers and McPike & Johnson, the latter learned that Meyers claimed to have paid Dennis for the mules. They became suspicious and telegraphed to Indianapolis for the return of the mules. Defendant returned them to Grant at St. Louis, and plaintiff brought this suit for damages. It will be seen the real contest is between plaintiff and Grant. What transpired at St. Louis, before and after the shipment to plaintiff, will more fully appear in the opinion.

I. The first objection urged by appellant is that no evidence was admissible under the answer, for the reason that it appears therefrom, that Grant was not entitled to the possession of the mules, at the time they were delivered to him by defendant.

We do not think the transaction, between Grant and Dennis, as detailed in the answer, constituted an absolute sale of the mules, but only an agreement to sell upon condition that the purchase price should be paid upon delivery at St. Louis.

The answer states, with great particularity, that Grant informed Dennis that he would only sell for cash. On being advised by Dennis, that the money was on deposit with McPike & Johnson, it was agreed that

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Dennis "would pay cash for them upon delivery to him at the stock-yards of McPike & Johnson in St. Louis." Under the contract set up in the answer, the possession was to remain in Grant and his agents, until the purchase price should be paid. No facts are subsequently stated in the answer, which recognize any right in Dennis to the possession; on the contrary it is specifically charged that Dennis and plaintiff's agent, Meyers, fraudulently and wrongfully obtained the possession from McPike & Johnson at St. Louis.

This understanding is strengthened, if not conclusively shown, by the manner in which it was performed by Grant, in so far as he could control its performance. The answer states that the mules were delivered to the railroad company by Grant and consigned to McPike & Johnson. The bills of lading were retained by Grant and forwarded with the draft to the consignees. The manner of the shipment and the terms of the bill of lading sufficiently, in themselves, indicate the intention of Grant to retain the possession and control of the mules until payment of the draft. *Bank v. Homeyer*, 45 Mo. 146; *Hutch. on Carriers*, sec. 130; 1 *Benj. on Sales*, 567.

It is insisted, in this connection, that before the contract of sale could have been rescinded by Grant, there must have been a return to Dennis of the amount paid, and the answer makes no allegation of a restoration of the money paid, or an offer to do so. There can be no doubt of the correctness of the legal proposition insisted on, that, where one party elects to rescind a voidable sale, he must first return the whole of the consideration paid thereon, but we think it has no application to the case in hand. If, as the answer charges, Grant was to retain possession of the property until the money was paid, and if Dennis got possession by improper means, his possession was wrongful and tortious, and Grant had the right to retake it and place

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himself in the situation in which the contract left him. *Page v. Crosby*, 24 Pick. 215; *Fleck v. Warner*, 25 Kansas, 492; *Duke v. Shackelford*, 56 Miss. 552; *Everett v. Hall*, 67 Maine, 497.

Neither do we think the facts stated in the answer bring the transaction under any of the provisions of section 2505, Revised Statutes, 1879. If Grant had sold the mules to Dennis, and, retaining possession, had sold and delivered them to an innocent purchaser, as between Dennis and the purchaser the statute might apply. The latter clause of the section has no application, for the reason that the possession was never given to the vendee.

II. It is insisted that the court committed error in permitting witnesses to testify to certain acts and declarations of Meyers, who was plaintiff's agent, in regard to the sale of the mules by Dennis to him at St. Louis, for the reason that they were made after the purchase and shipment of the mules had been completed.

It is a well-settled rule of the law of agency that the acts, declarations and admissions of an agent, in reference to the business of the principal, with which he has been intrusted, if made while engaged in its execution, or so soon thereafter as to constitute a part of the transaction, will bind the principal, and are admissible in evidence against him. "Where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time, and constituting part of the *res gestæ*." Story on Agency, sec. 134; Mechem on Agency, sec. 714; *Rogers v. McCune*, 19 Mo. 557; *Robinson v. Walton*, 58 Mo. 384; *Leahey v. Railroad*, 97 Mo. 165; *Railroad v. O'Brien*, 119 U. S. 90; *Western Boatman's Ass'n v. Kribben*, 48 Mo. 37; *Union Sav. Ass'n v. Edwards*, 47 Mo. 449.

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To determine whether the admission of the acts and declarations complained of fall under this rule, an examination of the evidence, to ascertain the circumstances under which they were made, becomes necessary.

That Meyers was the agent of plaintiff, with full authority to buy mules at St. Louis, direct their shipment, agree upon terms of payment, make payments in cash or by drafts on plaintiff, and generally to manage the business of plaintiff at St. Louis is undisputed.

The mules arrived at the stables of McPike & Johnson on Sunday morning. During the day negotiations, real or pretended, were carried on between Dennis and Meyers for the purchase of the mules by the latter. It was finally announced to Johnson by Meyers that the purchase had been made, and directions were given to forward them over defendant's road to plaintiff at Baltimore. The shipment was made in the afternoon between twelve and three o'clock.

The mules had been consigned to McPike & Johnson, but Dennis obtained the assumed right to sell by presentation of the statement he had procured from Grant, to the effect that he had paid \$140 per head for the mules. The negotiations between the parties were had in and about the stable and yard of McPike & Johnson.

Other transactions, in the purchase of mules, between Meyers and these commission men, remained unsettled. It was the custom, known to Meyers, that, when purchases were made at the stable, accounts were kept and settlements made through the proprietors of the stable. After the mules had been forwarded, at four or five o'clock of the same day, Johnson, or his bookkeeper, made out for Meyers, as agent for plaintiff, a statement of his account, of recent purchases of mules, in order to have a settlement. This statement included the purchase of Grant's mules, the item amounting to \$3,400. When this statement was presented to Meyers, he objected to this item of \$3,400,

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asserting that he had paid Dennis in cash for these mules, and the amount should not be included. Johnson then informed Meyers that it was a steal, and he (Meyers) knew it. No answer was made to this charge. Johnson then told Meyers not to leave town until the matter was settled. One of the objections made by plaintiff was to a witness testifying to this conversation.

On the conclusion of this interview, Johnson went out to hunt for Dennis. A witness, Gross, and Johnson between five and six o'clock, went to Meyer's hotel and inquired for Meyers and Dennis; neither was in. Witness then states in his testimony: "We started up Biddle street and between Biddle and O'Fallon we met Bill Meyers, and Johnson says: 'Billy, did you see Dennis?' he says, 'No; I didn't;' he says: 'Bill Meyers, this is a damn steal and you know it;'" Meyers made no reply at all; I carried a telegram to the telegraph office to stop the mules." The evidence of this witness in regard to this conversation between Johnson and Meyers was objected to.

When we keep in mind that Johnson was the consignee and agent of Grant; that he had the right to collect the purchase price of the mules; that Meyers had general authority from plaintiff to settle and pay for mules purchased; that payments were usually made through the commission firm; that payments had not been made, if made at all, in the usual way; that Johnson had the right to call on Meyers for payment; that the mules were still in transit consigned by McPike & Johnson to plaintiff, we must conclude that, at the time of these conversations, Meyers' authority to bind his principal continued; that the transaction was not complete; and that a settlement, if one had been made by Meyers at that time, would have bound plaintiff. We think the evidence was admissible under the rule stated above that when the acts of the agent will bind the principal, his declarations respecting the subject-matter will also bind him if made at the time.

III. Complaint is also made to the action of the court in giving and refusing instructions.

Plaintiff asked fourteen, and the court gave six of them. Defendant asked a number, and the court gave two of them. The court on its own motion gave seven, which undertook to cover every phase of the case. It is not reasonable to suppose that a trial judge can give a critical examination to each instruction when so many are asked. Neither under such circumstances should an appellate court examine critically those refused in order to discover one that might appropriately have been given. If the case was fairly submitted to the jury under the instructions that were given, nothing more should be required.

The closing paragraph of an instruction was as follows: "If you believe from all the facts and circumstances that Meyers knew that the possession of the mules had been obtained by Dennis by fraud and deception, and that Dennis had not paid for the same, then you will find that the plaintiff was not the innocent purchaser of said mules."

It is insisted that there was no evidence before the jury upon which this instruction could have been predicated. The objection was substantially disposed of in considering the sufficiency of the answer.

The evidence shows, beyond doubt, that Dennis obtained possession of the mules by fraudulent methods. The circumstances, we also think, are sufficient to create a strong probability that Meyers had notice of the methods used. Some of such circumstances, the evidence tends to prove, are, that Meyers and Dennis were old acquaintances; that Dennis went to the country to purchase mules for Meyers; that the mules came in on Sunday morning consigned to McPike & Johnson; that the negotiations between the parties were unusual; that the payment by Meyers was not according to the usual custom; that Meyers obtained the cash on Saturday

and carried it on his person over Sunday; that the payment was made in cash, if made at all, and not by draft or check; that when charged with knowledge he made no denial; that Meyers was present at the trial and was not called as a witness. From these circumstances the jury might well infer that Meyers had full knowledge of, if not complicity in, the fraudulent acts of Dennis, and the question was properly submitted to them.

The fourth instruction given by the court is as follows: "If you find from the evidence that Meyers was agent for plaintiff for the purchase of the mules in question, and that prior to the delivery of the mules to Meyers or to the defendant for shipment to plaintiff, and before payment to Dennis for the mules, said Meyers had knowledge of such facts and circumstances as would lead a man of ordinary prudence and care in like situation to infer that said Dennis had obtained said mules by any false representation as explained in instruction, numbered 3 (three), or that said Dennis had not paid for said mules to Grant, and was yet indebted to Grant for the purchase price thereof, then the plaintiff was not an innocent purchaser of said mules; but, unless you so find, then he was an innocent purchaser of said mules."

The objection made to the latter part of this instruction is "that a vendee of personal property may have knowledge that his vendor is indebted for the property which he purchased and yet be an innocent purchaser of it."

An instruction must be predicated upon the evidence in the particular case to be determined. Abstract propositions of law, though correct in themselves, may not apply to the facts of a particular case. The only apparent right Dennis had to the possession of the mules was the statement fraudulently obtained from Grant as follows:

Huse v. Ames.

"RENICK, January 12, 1883.

"*McPike & Johnson.*

"GENTS:—I sold to-day to Mr. John B. Dennis twenty-four mules for \$140 per head which makes \$3,360.

T. J. GRANT."

The consignment of the mules by Grant to *McPike & Johnson*, with no other direction, implied that they had the right to hold until they received instructions from the consignor. The only right Dennis had to take possession, sell and collect the proceeds was this statement fraudulently procured from Grant. If Meyers knew this statement was false, and the mules had not been paid for, the only foundation for his right to purchase from Dennis was destroyed, and his purchase could not be characterized as innocent.

The court instructed the jury that the statement given by Grant to Dennis gave apparent authority to Dennis to sell and deliver the mules, and upon which the purchaser had a right to rely, and that the burden was upon defendant to prove knowledge on the part of Meyers of the fraudulent acts of Dennis. The instructions were very favorable to plaintiff and he has nothing of which he ought to complain. Judgment affirmed. All the judges of this division concur.

HUSE, Assignee, v. AMES, Appellant.

DIVISION ONE.

1. **Assignment for Benefit of Creditors: SET-OFF.** In a suit by an assignee for the benefit of creditors for a debt due the assignor, the defendant cannot set off payments made by him after the assignment as surety for the assignor, though the payments were made on debts which were past due when the assignment was executed.

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- 2 ——— : ———. A defendant's equitable set-off, to be available, must in such case exist at the time of the assignment.
3. **Surety : CAUSE OF ACTION.** A surety has no cause of action against his principal, until he has paid the debt or some part of it.
4. **Corporation, Insolvency of : ASSIGNMENT : DIRECTORS.** Where a corporation becomes insolvent it is the duty of the directors to make an assignment for the benefit of creditors.
5. ——— : ——— : ———. The directors may authorize the vice-president to execute the deed of assignment.
6. ———. ——— : ———. The resolutions of the board in this case held sufficient to authorize the vice-president to execute such instrument.
7. **Deed : ACKNOWLEDGMENT : STATUTE.** The provisions of the act of 1888 (Laws, p. 26) prescribing the form for acknowledgments of conveyances of real estate are cumulative.

Appeal from St. Louis City Circuit Court.—HON. G. W. LUBKE, Judge.

AFFIRMED.

Isaac T. Wise and H. J. Grover for appellant.

(1) No exception was necessary to enable this court to review the ruling of the circuit court, on plaintiff's motion to strike out of defendant's answer the equitable set-off; the objection being predicated upon the theory that the part of the answer affected did not state facts sufficient to constitute a cause of action or defense. *First.* The objection to a pleading that it does not state facts sufficient to constitute a cause of action or of defense is a matter of error, and not of exception, and may be raised at any time in the progress of the case, without formal motion, and even after verdict, and even for the first time in the supreme court by simple suggestion. *Peltz v. Eichel*, 62 Mo. 177; *Birdsal v. Davis*, 58 Mo. 138; *Saulsbury v. Alexander*, 50 Mo. 144. The mere fact that the objection is raised by formal written motion cannot make that

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matter of exception, which, under the law, is a matter of error. *Second.* When a party defendant pleads a set-off, he in effect brings an action for the amount of the set-off. *Russell v. Owens*, 61 Mo. 185. *Third.* When an answer does not state facts sufficient to constitute a defense to plaintiff's cause of action, the defect may be reached, either by demurrer or motion to strike out. The purpose of either is elimination. *Howell v. Stewart*, 54 Mo. 400. *Fourth.* A motion to strike out all the substantial and material allegations of a stated cause of action, on the ground that the facts stated do not constitute a cause of action, is in effect a demurrer; and this is true whether the pleader brings his action by petition, or brings his action by way of set-off in an answer. *Austin v. Loring*, 63 Mo. 21; *Paxon v. Talmage*, 87 Mo. 13; *Russell v. Owens*, 61 Mo. 185. *Fifth.* Demurrers are parts of the record, and the action of the court thereon, if improper, is matter of error, as distinguished from matter of exception. *State v. Finn*, 19 Mo. App. 561, and decisions there cited. (2) It was error to strike out defendant's equitable set-off, pleaded in his amended answer. *First.* The only object of the stipulation for opening the case for further pleading, entered into at the time Ames made arrangements to pay off his indorsements, was to enable him to plead those payments as an offset in that case. And, if the pleadings had been open, such payments would have been proper supplemental matter, without any stipulation. R. S. 1879, secs. 3535, 3571, 3573; *Ward v. Davidson*, 89 Mo. 455. *Second.* Ames was the creditor of the Lindell Hotel Association, from the time he became its surety. The obligation of a principal to indemnify his surety against loss is a debt contracted from the time the surety became bound. The payment of the debt by the surety merely fixes the amount of the damage sustained by the surety, by reason of the breach of the contract of indemnity. But by the

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doctrine of relation the debt for that amount is held to be due by the principal from the time the surety became bound. *Rice v. Southgate*, 16 Gray, 142; *Byers v. Coal Co.*, 106 Mass. 131; *Duvall v. Rasin*, 7 Mo. 450; *Schlagel v. Murdock*, 65 Mo. 522. (3) The court erred in refusing to permit defendant to file the last answer tendered, having for its object the pleading of an additional note, paid by Ames, and not embodied in the former answer. In the words of this court, "The new matter here pleaded simply enlarged the extent of the relief by stating a continuance of the same wrong, and was proper supplemental matter," and, as there could be but one pleading, it was necessary to embrace the notes formerly pleaded, as well as this one. *Ward v. Davidson*, 89 Mo. 455; R. S. 1879, secs. 3535, 3571, 3573. (4) It was error to admit in evidence the instrument of assignment over defendant's objections. Potter's *Dwarris on Statutes*, p. 220; *State v. Railroad*, 51 Mo. 532; *City v. Riley*, 52 Mo. 427.

Waller B. Douglas and William H. Scudder, Jr.,
for respondent.

(1) The appellant, having taken no exception to the action of the court in striking out portions of his "second amended and supplemental answer," cannot be heard to complain of that action in this court. *Griffin v. Hanks*, 91 Mo. 109; *Ins. Co. v. Knaup*, 55 Mo. 156; *Bateson v. Clark*, 37 Mo. 31; *Harrison v. Bartlett*, 51 Mo. 170; *Tower v. Moore*, 52 Mo. 118; *Zeller v. Eckert*, 4 How. 297; Tidd's Practice, star p. 788; *People v. Buddensiek*, 103 N. Y. 487. (2) The court committed no error in denying appellant's motion for leave to file his "third amended and supplemental answer," the said answer being practically but a copy of a previous pleading which had been adjudged insufficient by the court. An attempt to refile a paper, already adjudged bad, is but trifling with the court,

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and should not be tolerated. Story on Equity Pleading, 336; *Ward v. Davidson*, 89 Mo. 455. (3) The court committed no error in holding that a claim which did not exist in favor of the defendant at the time when he was notified of the assignment could not be pleaded as a set-off. R. S. Mo. 1879, sec. 3368; *Walker v. McKay*, 3 Metc. 224. An indorser whose liability is fixed by notice of dishonor is a surety, and until a surety pays the debt for which he is security his demand has no existence. Indorser is surety. *Weimar v. Shelton*, 7 Mo. 240; *Priest v. Watson*, 75 Mo. 310; *Byers v. Coal Co.*, 106 Mass. 136; Daniel on Neg. Inst., sec. 1305. Surety has no claim until he has paid the debt. *Hearne v. Keath*, 63 Mo. 84; *Bonham v. Galloway*, 13 Ill. 68; *Poinder v. Carter*, 12 Ired. 242. (4) To constitute a valid set-off in equity, as well as at law, there must be a present indebtedness to the party pleading the same. *Reppy v. Reppy*, 46 Mo. 571; *Spaulding v. Backus*, 122 Mass. 553; *Bradley v. Angel*, 3 Comstock, 475; 2 Story, Eq. Jur. [13 Ed.] sec. 1436a, note; Pomeroy's Equity Jurisp., sec. 704; Pomeroy's Remedies and Remedial Rights [2 Ed.] 201; *Lockwood v. Beckwith*, 6 Mich. 168; *Smith v. Elver*, 22 Pa. St. 116. The mere fact that the plaintiff, or his assignor, is insolvent, without the concurrence of other circumstances will not authorize a court of equity to enforce a set-off which would not be valid at law. The case must be such that the party would be victim of fraud if his right of set-off were denied. STORY, J., in *Howe v. Sheppard*, 2 Sum. 409; *Lockwood v. Beckwith*, 6 Mich. 168; *Hale v. Holmes*, 8 Mich. 37; *Greene v. Darling*, 5 Mason, 201; *Graham v. Tilford*, 1 Metc. 112. (5) The court committed no error in admitting in evidence the deed of assignment. *First*. It was authorized by the resolution of the board of directors of the corporation; which resolution was read in evidence. *Hutchinson v. Green*, 91 Mo. 374; *Thorington v. Gould*, 59 Ala. 470. *Second*.

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The burden of showing the contrary is upon the appellant. *Schools v. Risley*, 28 Mo. 419; *Chouquette v. Barada*, 28 Mo. 497; *City of Kansas v. Railroad*, 77 Mo. 185; *Musser v. Johnson*, 42 Mo. 74. *Third*. The acknowledgment is sufficient, but, were it not so, the conveyance would be good as against the objections of this defendant. Statutory provision is not exclusive. *Bason v. Mining Co.*, 90 N. C. 417; *Morris v. Keil*, 20 Minn. 531; 1 Morawetz on Corporations, sec. 335. Substantial compliance with statute sufficient when statutory mode followed: *Adler v. Lange*, 21 Mo. App. 516; *Thompson v. Roe*, 22 How. 422; *State v. Holt Co.*, 39 Mo. 521. Even if acknowledgment was defective it could be taken advantage of by only a purchaser for value without notice. *Harrington v. Fortner*, 58 Mo. 468; *Martin v. Halley*, 61 Mo. 196. *Fourth*. The seal having been proved to have been at one time the seal of the corporation, it is presumed to have been such at the time when it was impressed upon this deed.

BLACK, J.—The Lindell Hotel Association, a corporation, made a voluntary assignment to James L. Huse, as assignee for the benefit of creditors, on the twenty-fourth of June, 1884. On the twenty-seventh of the same month the assignee commenced this suit against Henry Ames to recover a balance of \$3,393.10 due on account for board, etc. Ames was a director and stockholder of the insolvent corporation. In October, 1885, the defendant filed a second amended and supplemental answer, in which he denied the alleged indebtedness, put in issue the validity of the assignment, and set up an equitable set-off.

On motion of the plaintiff, the court struck out the set-off, to which ruling the defendant saved no exceptions. In October, 1886, he moved for leave to file a third amended and supplemental answer, which motion was overruled, and he then for the first time excepted

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to the ruling of the court. The plaintiff insists that defendant is here without any exceptions, to the ruling of the court concerning the set-off; but in the view we take of the case it is unnecessary to consume time in discussing this question, and we proceed to dispose of the case on its merits.

The facts concerning the alleged equitable set-off are these: The hotel association became insolvent and made the assignment on the twenty-fourth of June, 1884, and this suit was commenced by the assignee on the twenty-seventh of the same month. From January to May 17, 1884, the defendant had indorsed the paper of the association to the amount of about \$24,000. Some three or four of the indorsed notes matured before the date of the assignment, and others matured thereafter. One note for \$1,800, which matured before the assignment, was paid by the defendant in July, 1884, which was after the assignment and after the commencement of this suit. In July and August, 1885, a year or more after the assignment, the defendant paid on judgments recovered by holders of the indorsed notes the aggregate sum of \$14,867.19. It is the payments thus made which defendant sets up as a set-off.

An accommodation indorser occupies the position of a surety; and the contract of the principal to indemnify the surety for any payment which the latter may make takes effect from the time when the surety executed the contract by which he became liable for the debt of the principal. The liability of the surety becomes fixed, in the case of an indorser, by the protest of the note, though the agreement for indemnity relates back to the date of the note. The surety, however, has no cause of action against the principal, until he has paid the debt or some part of it. *Hearne v. Keath*, 63 Mo. 84. There was, therefore, no debt due to the defendant, either at the date of the assignment or at the commencement of this

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suit, and it is clear that he had no set-off within the statute upon that subject. Says Burrill: "A claim acquired after the assignment cannot be set off against the assignee; nor a liability existing, but not due at the time of the assignment, even if it becomes due before the suit was commenced." Burrill on Assignments [4 Ed.] sec. 403. If the defendant has any set-off, it is on some equitable grounds.

The law is now well settled, that an assignee, for the benefit of creditors, takes the assigned property subject to all equities existing at the date of the assignment. *State, etc., v. Rowse*, 49 Mo. 593; *Peet v. Spencer*, 90 Mo. 388. While the insolvent is not bound to pay otherwise than according to his contract, it is considered no hardship that he should accept payment of a demand owing to him before maturity. Hence, it has been often ruled in the state of New York, and is now the law of this state, that, if the claim against the assignee was due at the date of the assignment, then there is an equity because of the insolvency of the assignor, and the debt so due may be set off against the claim in favor of the assignee, though the claim held by the assignee was not due at the date of the assignment. *Smith v. Spengler*, 83 Mo. 408; *Smith v. Felton*, 43 N. Y. 419; *Smith v. Fox*, 48 N. Y. 674; *Coffin v. McLean*, 80 N. Y. 560. But the claim against the assignee must be due at the date of the assignment, and if it is not then due there is no equitable set-off. *Keep v. Lord*, 2 Duer, 78; *Myers v. Davis*, 22 N. Y. 489; *Chipman v. Bank*, 120 Pa. St. 86.

A demand cannot be set off because of the insolvency of the plaintiff in equity any more than at law, unless it existed against the plaintiff, in favor of the defendant, at the time of the commencement of the suit, and had then become due. *Reppy v. Reppy*, 46 Mo. 572; *Spaulding v. Backus*, 122 Mass. 553; *Pomeroy*, Eq. Jur., sec. 704; *Lockwood v. Beckwith*, 6 Mich. 168. If the defendant has an equitable set-off against the

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assignee, it must arise from the fact of insolvency of the plaintiff's assignor, taken in combination with the fact that defendant was the surety for the assignor. This brings us to the exact point in contest.

Morrow's Assignees v. Bright, 20 Mo. 298, was an action by the assignees for the benefit of creditors against Bright for money due upon a note. Bright pleaded, as a set-off, money paid by him after the assignment on a protested note of Morrow, on which Bright was indorser. The note was protested before assignment, and paid by Bright after that date. The facts of that case presented the question of law now before us. It was then held that there would be no impropriety in allowing the set-off, in analogy to the statute upon that subject concerning suits brought by executors and administrators. But another reason for allowing the set-off was stated in these words: "But, in substantial justice, as Bright was Morrow's surety, and compelled by law to pay the debt, and as Morrow was insolvent, Bright may be regarded as the creditor of Morrow from the time the note was protested. Then, as there was an indebtedness on the part of Morrow to Bright, and as the very act of assignment was evidence of insolvency, by which Bright became absolutely bound, there was an equity against the demand of Morrow at the time of the assignment, growing out of his indebtedness to Bright."

That case finds support in the recent case of *Merwin v. Austin*, 58 Conn. 32. It is to be observed that in that case the surety promised to, and did, secure the debt before the adjudication of insolvency. The court said: "He (the principal) having procured her suretyship for his own accommodation upon his implied agreement to save her harmless therefrom, it became his duty on November 13 to credit her upon his account with the amount of the note." November 13 was the date when the note became due, and insolvency of the principal was not declared until December following.

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This statement in the opinion, and some of the facts, tend to show that there were mutual and connected accounts between the principal and surety, which is not the situation of the parties in the case now in hand. That case does, however, give support to the views expressed in *Morrow v. Bright*, *supra*, and, unless the last-named case has been overruled or modified by this court, we should feel disposed to follow it.

White v. Henly, 54 Mo. 596, was a suit by the administrator of an insolvent estate. The defendant set up by way of offset certain notes executed by the intestate as principal, with defendant as surety. These notes were due and unpaid at the death of the intestate, and were allowed against the estate, and were paid off by the defendant surety, after they were thus allowed. The court, after citing the statute which provides that, "in suits brought by administrators and executors, debts existing against their intestate or testator, and belonging to the defendant at the time of their death, may be set off by the defendant, in the same manner as if the action had been brought by and in the name of the deceased," proceeds to say: "As the defendant did not own the notes, and was not a creditor at the time of the intestate's death, the notes could not be pleaded or allowed as a set-off in this suit." This case is clearly in conflict with what is said in *Morrow v. Bright*, concerning the statute just quoted. It is also said that *Morrow v. Bright* goes to the utmost limit of the law in allowing an equitable set-off. Now the statute just quoted concerning offsets, where the suit is by an executor or administrator, does not exclude equitable set-offs any more than do the other sections of the statutes concerning offsets in general. *State ex rel. v. Donegan*, 94 Mo. 66. There is no substantial difference between the facts in *Morrow v. Bright* and *White v. Henly*, and if the last case is good law it is difficult to see how the ruling in the former can stand.

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In *Walker v. McKay*, 2 Met. (Ky.) 294, it was held that a surety, until he pays the money for his principal, has no available demand against the principal which amounts to a set-off or equitable discount. The case of *Nettles v. Huggins*, 8 Richardson, 273, was a case where there had been an assignment for the benefit of creditors, and it was held that a surety could not set up as a discount money paid after the assignment. See on the same subject Pom. on Rem. & Remed. Rights [2 Ed.] p. 201. To justify a set-off against an assignee for the benefit of creditors there must be a present debt due at the date of the assignment. In this respect a surety stands on no better footing than any other creditor. The defendant had no such debt against the assignor at the date of this assignment. Indeed, he had no such debt when this suit commenced.

It is very true that a surety may in equity, before he has paid the debt, compel the principal to pay it or perform the obligation. Story, Eq. Jur. [13 Ed.] sec. 327; Pomeroy, Eq. Jur., sec. 1417, note 2. But the surety is not entitled to be reimbursed until he has paid the debt or some part of it. It is also to be remembered that our assignment law prohibits preferences. It looks to the equal distribution of the property of the assignor. The status of the creditors is fixed by the assignment in trust for them. If the right of set-off exists at that time it continues as against the assignee. If there is at that time an equitable right in favor of a creditor to a set-off or to any of the property assigned, that right is not disturbed by the assignment; but the equitable right must exist at that time, and this is true whether the creditor is or is not a surety. Here the defendant had no equitable set-off at the date of the assignment, and he, therefore, has none now.

It is next insisted by the defendant that the deed of assignment should have been excluded because not authorized by the corporation.

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It seems the Lindell Hotel Association was simply the lessee of the Lindell Hotel Company. The vice-president of the association made report to the directors at a meeting held on May 31, 1885, to the effect that the association was insolvent. Several resolutions were then offered. One gave the vice-president power to turn over the furniture described in a certain deed of trust. Another gave him authority to sell the remaining property to any new tenant, if such a sale could be made. A third declared that he "is authorized and empowered to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interests of this association, and to use the corporate seal for such purpose." These resolutions were adopted on the motion of the defendant with a proviso: "That I. H. Chassaing be authorized to receive and disburse all moneys belonging to the association, and act as manager of the same, until the business of the association is closed."

The corporation was insolvent, and under these circumstances it became the plain duty of the directors to make an assignment for the benefit of all the creditors. *Hutchinson v. Greer*, 91 Mo. 374. The resolution first quoted is broad in its terms and gave the vice-president ample authority to execute a deed of assignment. We do not see that the proviso limits that power in the least. Chassaing was to receive and disburse all moneys until the business of the association was closed. He was the secretary and treasurer of the association, and the proviso does no more than continue him as treasurer so long as the association continued its business. The vice-president had ample power to make the assignment.

It is again objected that the deed of assignment was not duly acknowledged. The deed was executed by Charles Scudder, vice-president of the Lindell Hotel Association, and attested by the secretary. The notary public in certifying the acknowledgment attempted to

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follow the form prescribed by the act of April 2, 1883 (Acts of 1883, p. 20), but omits the words, "by authority of its board of directors," where they appear in the form next after the words, "and that said instrument was signed and sealed in behalf of said association." The acknowledgment follows the form in all other respects. The acknowledgment would be sufficient as it is under section 743, Revised Statutes, 1879, for the notary still certifies to all the facts required by that section. The first section of the act of 1883 shows clearly that the forms therein given are simply additional to existing statutory requirements. An acknowledgment good under the law as it existed before the passage of that act will still be a good acknowledgment.

The judgment in this case is, therefore, affirmed.
All concur.

CASES DETERMINED

BY THE

SUPREME COURT

OF THE

STATE OF MISSOURI,

AT THE

APRIL TERM, 1891.

TOMLINSON, *Administrator*, v. ELLISON, *Appellant*.

DIVISION ONE.

1. **Practice in Supreme Court: ESTOPPEL.** Parties in the appellate court are bound by the positions assumed by them in the trial court.
2. **Gifts Causa Mortis: DELIVERY.** A legal essential to delivery of gifts in view of death is, that there shall be some manifestation of an executed purpose to deliver. A mere intent to deliver is not sufficient. Something must be done to show that the intent has been carried into effect.
3. ——— : ———. A gift *causa mortis* will fail in the absence of a delivery of the subject of the gift, or, at least, of the evidence of title thereto.

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17

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4. ———: ———. Delivery of a gift *causa mortis* may be made to one person for the benefit of another. But delivery by the donor to his agent of a document, as evidence of title to certain notes given by the donor to his brother, to be placed among the donor's other papers in the agent's possession, without directions to deliver to the donee, the instrument remaining in the agent's hands until after the donor's death, will not constitute delivery of the subject-matter of the gift.
5. Practice: DISQUALIFICATION OF WITNESS: WAIVER. Where a party to a suit is disqualified to testify, the taking of his deposition by the adverse party constitutes a waiver of his incompetency; but, if such waiver is relied upon as entitling him to testify, it should be so suggested to the trial court.

Appeal from Jackson Circuit Court.—HON. T. A. GILL,
Judge.

AFFIRMED.

THE action is in replevin for certain promissory notes, amounting, in total value, to about \$35,000. The answer is a general denial.

Plaintiff is administrator of the estate of Francis F. Ford, deceased. The notes belonged to the latter in his lifetime.

The defendant is a nominal party or mere stakeholder, the real party interested adversely to plaintiff being Henry T. Ford, brother to the deceased.

The latter claims title to the notes under the following instrument, viz.:

"Know all men by these presents, that I, the within-named F. F. Ford, in consideration of \$1 to me in hand paid, and the further consideration of love and affection, have assigned, and do by these presents transfer and assign, to my brother, H. T. Ford, or his assigns, the following described personal property, to-wit" (Here occurs a detailed description of some twenty odd notes of various makers).

"Now, I do by these presents assign to said H. T. Ford, or his assigns, the foregoing described notes and

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all sums of money due or that may become due on the same. And I do authorize the said H. T. Ford in my name to demand, sue for, recover and enjoy the moneys due or to become due on the aforesaid notes.

“Witness my hand and seal this ninth day of January, A. D. 1886.

“[Signed.]

F. F. FORD (Seal).

“Attest: D. ELLISON.”

The cause was tried with the aid of a jury.

It appeared that defendant had had the custody and care of many of the papers of F. F. Ford for some time before the occurrences out of which this action arose. His testimony contained in a deposition read by plaintiff at the trial was (in substance) this: He had some of the notes sued for and a part he never had; those he had were taken for land sold and money lent. F. F. Ford was in Kansas City for about three months prior to his death. He had no office. He was in witness' office a good deal. About January 5, 1886, he was taken sick. Some ten days before, he told witness he proposed to give his brother “Thornton” (H. T. Ford) these notes and most of his personal property. He spoke to witness about drawing up the instrument three or four days after he was taken sick; he spoke of it, January 7, and witness finished it on the ninth. Witness asked deceased “what he wanted done with the paper,” and he said, “put it among the papers,” or “with my other papers.” Ford signed the paper on the ninth and died about two weeks afterwards. When the paper was signed, witness had the other papers of deceased in the safe of witness in his office, in an envelope all together; that when H. T. Ford came to Kansas City a few days later (and before F. F. Ford died) witness told H. T. Ford that witness had it (the instrument), and H. T. Ford said for it to remain in the safe just as it was; afterwards he came over (before his brother died) and told witness he accepted of the

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assignment; that witness had, ever since then, had possession of the papers mentioned.

The witness was a lawyer and knew that the two brothers were jointly interested in Kansas City land. Witness had acted as agent of F. F. Ford in selling land and loaning money and had learned from him of the terms of deceased's will; that F. F. Ford said he was going to give his notes and most of his personal property to his brother; that he sent for witness on being taken sick and told witness what to do; that, when the first draft of the paper was made, Mr. Ford noticed the omission of some notes; they were hunted up and inserted; the instrument was then finished; read to him; he made some change in it and then signed it, making the statement already mentioned as to its disposition.

What then followed is thus stated:

"Q. And you took the paper and put it in your safe? A. Yes.

"Q. What papers were in that envelope? A. The notes in my possession were in that envelope.

"Q. And you put it along with those notes? A. Yes.

"Q. Do you know how H. T. Ford ever came to know of it? A. I told him myself; he may have known of it from other sources, but I told him I had the assignment here, soon after he came.

"Q. What did he say? A. He said to let it be in the safe just as it was.

"Q. Would you at that time, from what the deceased had told you, prior to the sickness, of what took place at the time of the execution of the instrument, would you have delivered it? A. Yes.

"Q. If he had asked for it? A. Yes; I wanted to turn it over to him.

"Q. Did you say you offered to deliver it to him? A. Well, I think I did. He promptly said, 'let it be in the safe.'"

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The witness got the data for the description of the various notes from a book, kept by deceased in a valise at his room.

In the course of the trial, evidence was given tending to show that, at the time, F. F. Ford executed the instrument, above described, he was of sound mind, and there was also evidence to the contrary.

It further appeared that F. F. Ford had made a will, January 25, 1884, with due solemnities. It was received in evidence. Its general features were that his widow was to have the use of the homestead, and also one-fourth of net annual income of the estate; their only child to have \$10,000 worth of the real estate at twenty-one; \$20,000 more of it at twenty-five; \$25,000 more at thirty; \$45,000 more at thirty-five, and the remainder at forty-five; that H. T. Ford should have, for life, one-eighth of the net annual income of the estate, excluding the homestead, and be discharged of all debts due by him to deceased. There were other dispositions of property and directions regarding its management that are not material to the present case.

Among other evidence the defendant produced and read the following letter to H. T. Ford from the deceased, received by the former about the time of its date, viz.:

“601 DEL. ST. KANSAS CITY, January 4, 1885.

“*Dear Brother* :—Your last at hand a day or two since; glad to hear. My health has not been as good in some respects as before. Thought it was inflammation of the lungs, but Dr. Porter thinks it is my heart; and now think so myself; am much troubled with shortness of breath and great weakness. I refer it all to my mental suffering for the past year or so. I have felt all along it was killing me. My previously weakened heart could not withstand it. Still I manage to keep on my feet and attend to business as well as I can. Am feeling some better now for a few days. I am not

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yet through with repairs on hotel, and cannot yet report expense."

(Then follows a long statement of particulars regarding the management, repairs, etc., of real estate in Kansas City, after which the letter proceeds thus): "Have had a talk with Ellison about my health, and property in his hands, *i. e.*, notes, mortgages, etc., to deliver direct to you in case of accident. I have, all told, \$35,000 to \$40,000; do not be alarmed by these statements; they are only precautions; they are not in my will which I carry with me. Will make full report of expenses when I get through. Hope In. will write when he gets to Washington. Weather very mild; take care of your health and not overwork. Affectionately.

F. F. FORD."

The case was submitted to the jury under instructions of the court, referred to in the opinion, and a verdict for the plaintiff followed. After the necessary motions and exceptions defendant appealed to the supreme court. The other material facts appear in the opinion.

C. O. Tichenor for appellant.

(1) The claim of H. T. Ford to the notes sued for is based upon a writing, clear in its terms, reciting a consideration and under seal. There is no question as to its execution, or as to its meaning. It was made in pursuance of a fixed purpose, evidenced by a letter from deceased to his brother as well as by a talk with defendant. (2) The whole question in each case of a gift *causa mortis* is whether the gift is complete, in so far as the donor is concerned. *William v. Giles*, 117 N. Y. 343; *Dalton v. Wobam*, 24 Pick. 261; *Grymes v. Hone*, 49 N. Y. 17. (3) There is no dispute about the facts as to delivery. It is simply a question of law. They show such a delivery as is required, which must be such as will place the property within the dominion

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and control of the donee with intent to confer title upon him. *Duffield v. Elwes*, 1 Bligh. N. R. 497; *Stephenson's Adm'r v. King*, 81 Ky. 430; *Harris' Appeal*, 5 Watts and S. 498; *Crawford's Appeal*, 61 Pa. St. 6; *Ellis v. Secor*, 31 Mich. 186; *Shackelford v. Brown*, 89 Mo. 546. It was said in *Somers v. Pumphrey*, 24 Ind. 240: "The law does not prescribe any particular form of words or actions, as necessary to consummate delivery. Anything done by the grantor from which it is apparent that a delivery is intended, either by words or acts, or by both combined, is sufficient." *Folly v. Vantryl*, 4 Halst. 158; *Hillibrant v. Brewer*, 6 Texas, 51; *Barney v. Ball*, 24 Ga. 514; *Standiford v. Standiford*, 97 Mo. 231. (4) If there was no delivery a trust was created in the deceased for his brother as to the property described in the writing under seal. *Helfenstein's Estate*, 77 Pa. 331; *Bund v. Bumbing*, 78 Pa. 210; *Boone v. Bank*, 84 N. Y. 83; *Minor v. Rogers*, 40 Conn. 512; *Ellis v. Secor*, *supra*. (5) Defendant should have been allowed to testify. The statute ought to have been liberally interpreted, as its object is to remove and not to impose restrictions. *Nailor v. Williams*, 8 Wall. 109.

Muckle & Winn and Warner, Dean & Hagerman
for respondent.

(1) To constitute a valid *donatio causa mortis*, the donor must part with all dominion over the property to the donee, to belong to him presently, as his own property, in case the donor should die without making any change in relation to it. *Huey v. Huey*, 65 Mo. 689; *Cook v. Brown*, 34 N. H. 460; *Walter v. Ford*, 74 Mo. 195; *McCord's Adm'r v. McCord*, 77 Mo. 188; *Standiford v. Standiford*, 97 Mo. 231; *Weisinger v. Cooks*, S. Rep. June 11, 1890, p. 494; *Drew v. Hagerty*, 81 Me. 231; *Appeal of Walsh*, 122 Penn. St. 177; *Yancy v. Field*, 8 S. E. Rep. 721. (2) A gift which is to take effect

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only upon the death of the donor is not valid, but a testamentary disposition of property, and in violation of the statutes. *McGrath v. Reynolds*, 116 Mass. 566; *Baskett v. Hassell*, 107 U. S. 602; *Powell v. Hellicar*, 26 Beav. 261; *Reddel v. Dobree*, 10 Sim. 244; *Farquaharson v. Cave*, 2 Colly. C. C. 356; *Hatch v. Atkinson*, 56 Me. 324; *Bunn v. Markham*, 7 Taunt. 224; *Coleman v. Parker*, 114 Mass. 30; *Wing v. Merchant*, 57 Me. 383; *McWillis v. Van Vacter*, 35 Miss. 428; *Edgerton v. Edgerton*, 17 N. J. Eq. 419; *Michener v. Dale*, 23 Pa. St. 59. (3) A written assignment of personal property by way of a gift *causa mortis* to a person named therein which is never delivered to such person, but is detained by the party who executes the assignment or his agent for him, does not create a trust in favor of the person designated as beneficiary in the assignment. *Trough's Estate*, 75 Pa. 115; *Zimmerman v. Streeper*, 75 Pa. St. 147. (4) The appellant was properly not permitted to testify against the administrator in favor of himself as to a transaction had with the testator.

BARCLAY, J.—The cause was submitted by both parties in the trial court on the theory that it was governed by the law applicable to gifts in view of death. The instructions given at the instance of each party plainly show this. We, therefore, review the case from the legal standpoint thus furnished, since parties to litigation are regarded as bound here by the positions assumed by them in the trial court, as held in *Tetherow v. Railroad* (1888), 98 Mo. 85, and other recent precedents. *Whitmore v. Sup. Lodge* (1889), 100 Mo. 47; *Jennings v. Railroad* (1889), 99 Mo. 394.

The vital issue in the case, as shown by the accompanying statement of facts, is upon the question of delivery of the paper by which title to the notes is claimed to have been transferred to H. T. Ford. The evidence on this point is meager. Its effect is to show that, after F. F. Ford signed it, he directed defendant,

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his agent (who had charge of notes and other papers of his), to put it among the papers, or his papers. This direction was obeyed. The instrument thus remained in defendant's charge until after F. F. Ford died. No instruction was given defendant by the latter to deliver the paper to H. T. Ford.

One legal essential to delivery of gifts in view of death is, that there shall be some manifestation of an executed purpose to deliver. A mere intent to deliver is not sufficient. Something must be done to show that the intent has been carried into effect. The custody of the document is not always decisive of this issue, though it usually throws light upon its solution.

A delivery may be made to one for the benefit of another person ; but, in the case before us, the document in question was delivered to the agent, not of the receiver but of the giver, to be placed among the papers of the latter, where it remained until death put a stop to all his unfinished transactions.

Such a gift, as is sought to be here established, must fail in the absence of a delivery of the subject of the gift, or of the evidence of title thereto, at least. As to the former, it is not claimed that there was a delivery. Whether more than the delivery of the instrument, conveying title, is necessary to complete the gift need not now be discussed, since, in our view, the failure of proof of delivery of the instrument itself is obviously fatal to the claim of title in H. T. Ford. The case does not require us to further penetrate the labyrinth of law concerning gifts in view of death. The single phase of the subject above presented is decisive against defendant.

As we find the defendant's own testimony offers no obstacle to plaintiff's recovery on the conceded facts, it does not seem necessary to review the instructions in detail.

II. A point of practice remains. Defendant was introduced as a witness in his own behalf at the trial;

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but was excluded on plaintiff's objection. Afterwards plaintiff read defendant's deposition, given in this cause at plaintiff's instance. It is claimed that the court erred in its exclusion of defendant's oral evidence.

The fact that plaintiff had taken defendant's deposition in the same action amounted to a waiver of any alleged incompetency on his part; but, when defendant was called to testify orally, the attention of the trial court was not directed to any waiver. Without it, defendant was clearly incompetent under the statute on the subject. R. S. 1879, sec. 4010. If defendant relied upon a waiver, as entitling him to testify, that should have been suggested to the trial court. This was not done. After the waiver became apparent (by the reading of the deposition by plaintiff in rebuttal), defendant did not then offer to testify in explanation, or otherwise, with reference to the matters contained in the deposition.

We perceive nothing in the rulings on this point prejudicial to the substantial rights of defendant.

The judgment is affirmed. SHERWOOD, C. J., BLACK and BRACE, JJ., concur.

 SHORTEL, *Appellant*, v. THE CITY OF ST. JOSEPH.

 DIVISION ONE.

1. **Master and Servant: SUPERIOR KNOWLEDGE OF MASTER.** Master and servant do not stand upon an equal footing, even when they have equal knowledge of danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master and is not entirely free to act upon his own suspicions of danger.
2. — : — : **NEGLIGENCE OF SERVANT.** If the master orders the servant into a place of danger and the servant is injured, he is not guilty of contributory negligence, unless the danger is so glaring that a reasonably prudent person would not have entered into it.

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3. ——— : ——— : ———. If a servant obeys the master's order to go into a place that is so obviously dangerous that a prudent person, though acting in his capacity, would not obey it, he will be guilty of contributory negligence which will defeat a recovery for an injury resulting therefrom.
4. **PRACTICE : INSTRUCTIONS.** Instructions which taken as a whole properly present the law of the case to the jury are not objectionable.
5. ——— : ——— : **CLERICAL ERROR.** Clerical errors in an instruction, which are readily discovered upon a reading of it, will not constitute reversible error.

Appeal from Buchanan Circuit Court.—HON. O. M. SPENCER, Judge.

AFFIRMED.

B. R. Vineyard for appellant.

(1) The city engineer was defendant's vice-principal and plaintiff was entitled to recover. *Gormly v. Iron Works*, 61 Mo. 492; *Whalen v. Church*, 62 Mo. 326; *Cook v. Railroad*, 63 Mo. 397; *Stephens v. Railroad*, 86 Mo. 229. (2) The servant is not chargeable with contributory negligence if he go into a place of danger under the direction of the master, especially when he has the assurance of the master that it is safe for him to do so. *Keegan v. Kavanaugh*, 62 Mo. 232; *Flynn v. Railroad*, 78 Mo. 205; *Stephens v. Railroad*, 96 Mo. 212. And this is so though the servant himself have good reason to apprehend the danger, and believed it unsafe to obey the master. *McGowan v. Railroad*, 61 Mo. 532; *Rowland v. Railroad*, 20 Mo. App. 463. In the language of this court, such assurance "amounts to a guaranty of safety, and the master will be liable for any injury then resulting," where the servant acts with reasonable care in executing the master's orders. *McGowan v. Railroad*, 61 Mo. 532; *Aldridge v. Railroad*, 78 Mo. 565; *Malone v. Morton*, 84 Mo. 436. (3) The court erred in giving defendant's first, second

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and third instructions. After plaintiff had been ordered by defendant's vice-principal to remove the centers supporting the arch, and been assured that it was safe, plaintiff had a right to rely on the assurance, without first investigating the strength of the arch or the set of the cement therein. *Stephens v. Railroad*, 96 Mo. 212; *Malone v. Morton*, 84 Mo. 436. (4) The court erred in giving the defendant's first instruction without confining the element of contributory negligence, which would prevent a recovery, to a want of such ordinary care as should be exercised by those possessing no more skill than the evidence tended to show the plaintiff had. *Dowling v. Allen*, 74 Mo. 13; *Malone v. Morton*, 84 Mo. 436; *Reber v. Tower*, 11 Mo. App. 199; *Porter v. Railroad*, 71 Mo. 66, 79. (5) The first and also the second instructions of the defendant are furthermore faulty in not confining the danger, concerning which the failure to exercise ordinary care would have prevented plaintiff from recovering, to that danger which was patent. *Stoddard v. Railroad*, 65 Mo. 521; *Conroy v. Works*, 62 Mo. 37; *Keegan v. Kavanaugh*, 62 Mo. 232; *Gibson v. Railroad*, 46 Mo. 169; *Porter v. Railroad*, 71 Mo. 66. (6) This case must be reversed on account of the error in defendant's first instruction, resulting from a confusion of terms in referring to the parties. The instruction refers to "plaintiff's alleged negligence and carelessness contributing to the injury of defendant." There is nothing in the record to justify the court in calling the attention of the jury to any "injury of the defendant." (7) Appellant was entitled to correct declarations of law on the subject of contributory negligence in the instructions given on both sides. The jury may have followed the erroneous or imperfect standard set up in one purporting to cover the whole case, rather than the correct and perfect standard set up in the other. *Thomas v. Babb*, 45 Mo. 384; *Ellison v. Weathers*, 78 Mo. 126; *Sullivan v. Railroad*, 88 Mo. 182; *Slate v. Herrell*, 97 Mo. 105; *Billups v. Daggs*,

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38 Mo. App. 367; *Nasse v. Algermissen*, 25 Mo. App. 189.

M. A. Reed for respondent.

(1) If the plaintiff knew of the existence of the danger, or it was so obvious and patent that an ordinarily observant person in the exercise of ordinary care and caution could have seen it, and not have exposed himself, then the plaintiff cannot recover. *Aldridge's Adm'r v. Furnace Co.*, 78 Mo. 564; *Nolan v. Shickle*, 69 Mo. 340; *Stephens v. Railroad*, 96 Mo. 212; *Keegan v. Kavanaugh*, 62 Mo. 232; *Huhn v. Railroad*, 92 Mo. 440; *Wood's Master & Servant*, secs. 335, 336. Even in those cases, when assurances of safety are given by defendant to allay suspicions of danger, and the question is whether the danger was so great as to be obvious and apparent, the question of contributory negligence is for the jury. 62 Mo. 230; *Wood's Master & Servant*, sec. 343. But the plaintiff recognizes the ground-work of our defense and that it was a proper question for the jury, when he appended the following words to the last of his first instruction: "Unless the danger was so glaring as to be apparent to the mind of an unskilled man." Every phase of the case then was properly submitted to the jury. (2) A servant or agent has the right to refuse to expose himself to peril, though ordered by his employer so to do, and such refusal does not give his employer the legal right to discharge him. *Wood's Master & Servant*, sec. 116. (3) Appellant's sixth point urges as an objection to defendant's first and second instructions that they did not qualify and characterize the danger threatening plaintiff as "obviously dangerous," or "patent," or "glaring." But even if this was an omission it was covered by defendant's third instruction, where these terms are used, and it is also on the last end of plaintiff's first instruction. Where the instructions, taken as a whole, present the case fairly to the

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jury, the giving of an instruction which omits a material fact is not necessarily fatal, and where there does not appear to be any dispute as to that fact, and where it is apparent that the appellant could not have been thereby prejudiced. *Stone Co. v. Sinclair*, 10 Mo. App. 593. The instructions of the court must all be taken together. They constitute the entire charge of the court, and if defects or omissions in one instruction are supplied in another, and are consistent and not misleading, no complaint can be made. *Whalen v. Railroad*, 60 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Karl v. Railroad*, 55 Mo. 476. (4) Appellant's sixth point hardly needs an answer. The precise point has been passed upon. *Bank v. Goldsold*, 8 Mo. App. 596.

BLACK, J.—The plaintiff brought this suit to recover damages for personal injuries received while engaged in repairing a sewer. The work was done by the city engineer, who procured the material, employed the men, and superintended the work by authority of a city ordinance.

The petition alleges that after a section of the sewer had been arched over the engineer directed plaintiff and one Murray to go under the arch and remove the supports; that the engineer assured the plaintiff and Murray that it was safe to do so; that, relying upon the assurance, they proceeded to carry out the order, and while thus engaged the arch fell in on the plaintiff; and that the injury to plaintiff was caused by the negligence of the engineer in causing the supports to be removed before the cement used in the walls had hardened.

The answer was a general denial and contributory negligence on the part of the defendant.

According to the bill of exceptions the plaintiff introduced evidence tending to prove all of the allegations of the petition, that he was a day laborer not skilled in the work, was not aware of the danger, and that none but a skilled person would, by the use of

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ordinary care, have foreseen the danger. And defendant offered evidence tending to show that the danger was so obvious and apparent that any person, skilled or unskilled, could, by the exercise of ordinary care, have foreseen and avoided the danger, and that plaintiff was warned of the danger attending the undertaking.

The court, at the request of the plaintiff, instructed the jury, that if they believed the engineer, "after the completion of a section of the said sewer, directed the defendant and others to remove the supports under said section, and assured them that it was perfectly safe to do so, when in point of fact it was not safe, and that the plaintiff was unskilled in the matter of safety or unsafety thereof, then the defendant is liable for any injury resulting to plaintiff therefrom, even though the plaintiff, or others in his presence, might have entertained or expressed the opinion that the removal of said supports was unsafe, if the plaintiff, in assisting in such removal, acted upon said assurance of said engineer, unless the danger was so glaring as to be apparent to the mind of an unskilled man."

The court, at the request of the defendant, gave these instructions: "2. Although the engineer ordered plaintiff and Murray to remove the centers, and the removal of them was dangerous and unsafe, yet if, before plaintiff proceeded to remove the same, he could, by the exercise of ordinary care and observation, under all the circumstances, have ascertained the danger attending such removal, then the plaintiff cannot recover.

"3. Although the plaintiff was ordered to remove the centers under the arch of the sewer, yet if the removal of such centers at the time and under the circumstances detailed in evidence was such an obviously dangerous and unsafe proceeding that a person of ordinary and common prudence, under all the circumstances, would have refused to remove the same, then it was the duty of plaintiff to have disobeyed such order of

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defendant's engineer, and he cannot recover in this case."

The proposition that the engineer was the agent and vice-principal of the defendant corporation is not controverted, and, from the evidence and instructions, it appears to have been conceded on the trial that it was unsafe and dangerous to remove the centers at the time they were removed, and that the plaintiff attempted to remove the centers by the order and direction of the engineer. The real question, therefore, is as to what care, if any, the defendant should have exercised when thus acting under the order of the defendant, for the engineer represented the defendant.

The master and servant do not stand upon an equal footing, even when they have equal knowledge of the danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master. The servant is not entirely free to act upon his own suspicions of danger.

If, therefore, the master orders the servant into a place of danger, and the servant is injured, he is not guilty of contributory negligence, unless the danger was so glaring that a reasonably prudent person would not have entered into it. *Keegan v. Kavanaugh*, 62 Mo. 230; *Stephens v. Railroad*, 96 Mo. 209. But these cases show that, though the servant is ordered into a place of danger, still, if the danger is so obvious that a prudent person, though acting in the capacity of a servant, would not obey the order, then he will be guilty of contributory negligence which will defeat a recovery.

Now the defendant's third instruction conforms to the principles of law just stated, so there is no valid objection to it. Indeed, the plaintiff submitted the case to the jury on the same theory, for his instructions conceded that he could not recover if "the danger was so

Ex parte Mitchell.

glaring as to be apparent to the mind of an unskilled man."

The defendant's second instruction does not, it is true, in so many words, contain the proposition that to defeat a recovery the danger must have been so glaring as to be apparent to the mind of an unskilled person ; but it does submit to the jury the question whether defendant was wanting in "ordinary care and observation under all the circumstances." This instruction must be considered in connection with the others given at the request of plaintiff and at the request of the defendant, which are more specific and point out the circumstances under which the plaintiff could not recover. The instructions taken as a whole are not objectionable.

The defendant's first instruction uses in one place the word plaintiff when it should be defendant, and in another place the word defendant when it should be plaintiff ; still these are mere clerical errors readily discovered upon reading the instructions and constitute no ground whatever for a reversal.

Some other objections are made to the instructions, but they are equally unsubstantial. The judgment is affirmed. The other judges concur.

Ex Parte MITCHELL.

DIVISION TWO.

1. **Habeas Corpus: DISCHARGE: JUDGMENT OF COMPETENT COURT.** A prisoner detained by the final judgment of a competent court of criminal jurisdiction, upon conviction for selling intoxicating liquors in violation of the local-option law, will not be discharged on *habeas corpus* upon the ground that such law had never been legally adopted, that being a question that the trial court had jurisdiction to determine, and from whose decision an appeal would lie.

104	121
144	85
104	121
180	240
180	280
104	121
176	386

Ex parte Mitchell.

2. ——— : APPEAL : WRIT OF ERROR. The writ of *habeas corpus* is not the remedy for the correction of the errors of trial courts and cannot be substituted for appeals and writs of error.

Habeas Corpus.

WRIT DENIED.

George H. Harrison and *H. J. Drummond* for petitioner.

(1) The local-option law having never been adopted in Marion county, the circuit court had no lawful authority to hear and determine the case. Church on *Habeas Corpus*, sec. 356, pp. 465-6; *Ex parte Sam*, 51 Ala. 34; *Ex parte Winston*, 9 Nev. 71. It is conceded that it is well settled in this state that a proceeding under the *habeas corpus* act will not be allowed to operate as an appeal or writ of error, which would be the remedy in mere error or irregularity of the court. Although the court may have had jurisdiction over the body of the petitioner, and the offense with which he was charged, yet as the judgment, under which he is held, is void for want of authority of law to render it, he is entitled to a discharge. Church on *Habeas Corpus*, sec. 371, p. 494; *Ex parte Lange*, 18 Wall. 176; *Ex parte Wooldridge*, 30 Mo. App. 612-618. If the last-cited case is persuasive authority, it is believed to be absolutely decisive of this case. (2) It is the duty of this court to assume or take jurisdiction in this proceeding, and examine all matters in any way tending to show the want of the existence of jurisdiction or lawful authority in the circuit court of Marion county to do what it did in the premises. *Ex parte Rollins*, 20 Va. 276; Cooley on Const. Lim. [4 Ed.] 431-435; Church on *Habeas Corpus*, sec. 366, p. 481, sec. 370, pp. 490-491; *Ex parte Wooldridge*, 30 Mo. App. 612. No appeal or writ of error lies to this court in the case against petitioner. Const. of Mo., sec. 12, art. 6; *State v. McNeary*,

Ex parte Mitchell.

88 Mo. 143. Its jurisdiction is original and it is the practice to exercise it. *In re Swann*, 96 Mo. 44; *Ex parte Crenshaw*, 80 Mo. 441, and authorities cited; *Ex parte Turner*, 44 Mo. 181; *In re Snyder*, 64 Mo. 58-63; *Ex parte Hallowell*, 74 Mo. 395; *Ex parte Clay*, 98 Mo. 578; *In re McDonald*, 19 Mo. App. 370; *In re Woolbridge*, 30 Mo. App. 612.

John M. Wood, Attorney General, for respondent.

GANTT, P. J.—This is an application by the petitioner, Christian Mitchell, for release on a writ of *habeas corpus*, from the common jail of Marion county.

He avers that he is illegally restrained by the sheriff of said county, in this, that in November, 1889, he was indicted by a grand jury of said county for selling intoxicating liquors therein contrary to the provisions of what is known as the "local-option law," of Missouri; and that on the eleventh day of November, 1890, he was tried in the circuit court of said county and found guilty thereof, and his punishment fixed and assessed at a fine of \$600, and a judgment for that amount was rendered against petitioner, and it was further adjudged that, if petitioner did not pay said fine, he should be committed to the common jail of said county until it was paid, together with the costs.

He further alleges that he did not pay said fine, and, by reason of his default, a *capias* execution was issued by the clerk of the circuit court of said county on the twenty-second day of December, 1890, to the sheriff of said county, who by authority thereof arrested petitioner and has ever since confined him in said county jail.

The illegality complained of is, that said "local-option law" had not been adopted in said county, and, therefore, his imprisonment for violation thereof was illegal.

Ex parte Mitchell.

The return to the writ shows a *capias* execution in due form and that the officer is holding defendant to satisfy the same, in accordance with the judgment and sentence of the circuit court of Marion county.

By section 5376, of the Revised Statutes of Missouri, 1889, it is made the duty of the court before whom a prisoner is brought on a writ of *habeas corpus* to forthwith remand the prisoner, if it shall appear that he is detained "by virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree."

It appears by petitioner's own statement that he was indicted and convicted in a court of general criminal jurisdiction for Marion county. That court had jurisdiction to determine whether the county of Marion had adopted the law, commonly known as the "local-option law," being an act to provide for the preventing of the evils of intemperance by local option in any county in this state. Acts, 1887, p. 179. The act itself has been decided to be constitutional by this court in *State ex rel. Maggard v. Pond*, 93 Mo. 605.

If defendant claimed the evidence showed this act had not been adopted, and that the circuit court erred in holding it had been, he ought to have saved the evidence in a bill of exceptions and brought his case here by appeal.

The writ of *habeas corpus* is not the remedy to correct error of trial courts, and cannot be substituted for appeals and writs of error. Every suggestion made in behalf of the prisoner here could have been made in the circuit court of Marion county, and that court should have had an opportunity of passing upon these questions.

This court has a sufficient docket without reaching out and assuming the jurisdiction committed by the law to other courts. The prisoner will be remanded and the writ dismissed. All the judges of this division concur.

The State ex rel. The Mo. Pac. Ry. Co. v. Edwards.

THE STATE *ex rel.* THE MISSOURI PACIFIC RAILWAY
COMPANY V. EDWARDS, *Judge, et al.*

DIVISION TWO.

1. **Certiorari** : OFFICE OF WRIT. The office of the writ of *certiorari* is to bring the record of the proceedings of an inferior court or tribunal before a superior court to determine whether it had acted legally and within its jurisdiction.
2. ——— : ———. It is in the nature of a writ of error to review the proceedings of the inferior court or tribunal and is only allowed where no appeal or writ of error or other available mode of review is afforded.
3. ———. *Certiorari* must be founded upon a final adjudication of the matter involved and cannot issue upon a merely interlocutory order.
4. ———. An order of court appointing commissioners in a condemnation proceeding is merely interlocutory, from which no appeal or writ of error will lie and is not a sufficient basis upon which to issue a writ of *certiorari*.

Certiorari.

WRIT DENIED.

H. S. Priest for relator.

MACFARLANE, J.—The St. Louis Merchants' Bridge Terminal Company commenced a proceeding against relator in the circuit court of the city of St. Louis for the purpose of condemning a right of way across the relator's tracks and crossing and making intersection and connection with its railway in the city of St. Louis.

The proceedings were removed to the circuit court of St. Charles county by change of venue, and that court appointed commissioners so assess the damages and determine the points and manner of such crossings, intersections and connections and to determine the compensation therefor. The order appointing the commissioners recites that due notice had been given relator

104	125
123	532
104	125
66	667
104	125
154	689
154	691
154	692

104	125
170	1390
173	1414

The State ex rel. The Mo. Pac. Ry. Co. v. Edwards.

and that the parties could not "agree as to the points and manner of crossing, intersecting and connecting with defendant's, the Missouri Pacific Railway Company, road, nor the compensation therefor."

Pending the inquiry by the commissioners, and before they make report, relator makes application to this court for a writ of *certiorari*, directed to respondents, the judge of said circuit court, and said commissioners, for the purpose of requiring them to certify to this court a copy of the proceedings in said cause to the end that the same may be reviewed and quashed or modified.

The office of a common-law writ of *certiorari* is to bring the record of the proceedings of an inferior court or tribunal before a superior court to determine whether it had acted legally and within its jurisdiction. *State v. Smith*, 101 Mo. 174; *Railroad v. Bd. of Equalization* 64 Mo. 294.

It is in the nature of a writ of error to review the proceedings of the inferior court, or tribunal, and is only allowed where no appeal or writ of error or other available mode of review is afforded. *Railroad v. Young*, 96 Mo. 41; *Poe v. Machine Works*, 24 W. Va. 517; *Ennis v. Ennis*, 110 Ill. 78; *Hauser v. State*, 33 Wis. 678; 46 Ga. 41; 47 Ark. 511.

An appeal lies from a final judgment of the circuit court in a condemnation proceeding. R. S. 1889, sec. 2246; *Railroad v. Evans & Howard Co.*, 85 Mo. 307; *Railroad v. Railroad*, 94 Mo. 540.

The statute (secs. 2543, 2736) gives the circuit court jurisdiction of the subject-matter of the proceeding and the record filed with the petition shows jurisdiction of the person of relator. The court has jurisdiction to hear and determine the case. *State ex rel. Railroad v. Railroad*, 100 Mo. 60. If it has committed errors, it may correct them itself before final adjudication.

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Unless especially provided by statute, the writ is never used to withdraw from inferior jurisdiction the questions under consideration, and to be tried therein. Its most frequent use is applied to the review of the determinations of tribunals, boards and officers, exercising judicial functions in summary proceedings. If each successive step of the proceeding could be brought before a court for review, the jurisdiction would be transferred from the tribunal, invested by law with authority over the subject-matter, to the superior court. By this means proceedings, intended to be summary, could be prolonged indefinitely and their purposes wholly frustrated.

The writ, operating as it does as a writ of error, is necessarily founded upon a final determination and adjudication of the matter involved, and cannot issue upon an order merely interlocutory. *People v. Judge*, 40 Cal. 479; *Stokes v. Early*, 45 N. J. L. 479; *Lynde v. Noble*, 20 Johns. 82; *Ex parte Hamilton*, 58 How. Rep. 290.

The order of the court appointing commissioners is not a final determination of the proceeding from which an appeal or writ of error will lie. *St. Joe Term. Ry. Co. v. Railroad*, 94 Mo. 540. The order being merely interlocutory is not a sufficient foundation upon which to issue the writ of *certiorari*. Writ denied; GANTT, P. J., and THOMAS, J., concur.

WOLFF *et al.* v. WARD *et al.*, *Appellants.*

DIVISION TWO.

1. **PRACTICE: CHANGE OF VENUE: RECORD PROPER: EXCEPTIONS.** Applications for changes of venue are not a part of the record proper, and the ruling of the trial court thereon will not be reviewed, unless exceptions are saved and the matter is brought to the attention of the trial court in the motion for a new trial.

104	127
107	458
104	127
51a	233
104	127
129	61
104	127
c146	330
c146	479
104	127
163	644

104	127
176	*317

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2. ——— : APPOINTMENT OF RECEIVER. A like rule is applicable to the action of the court in the appointment of a receiver.
3. ——— : CHANGE OF VENUE. Whether or not an application for a change of venue asked eight or ten days after knowledge of the cause thereof came to the appellant is timely made, rests largely in the discretion of the trial judge.
4. ——— : ———. An application for a change of venue because of the prejudice of the inhabitants of the county is properly overruled where the case is one in equity, triable by the court.
5. **Mortgage : FORECLOSURE : EQUITY.** A mortgagor can in this state maintain a bill in equity for the foreclosure of the mortgage.
6. ——— : ——— : ———. The petition in this case examined and held to be a bill in equity to foreclose a mortgage and to state facts sufficient to constitute a good cause of action in equity.
7. **Deed of Trust : SALE : TITLE OF PURCHASER.** A sale by a trustee under the power conferred by a deed of trust, whether the sale be valid or invalid, vests in the purchaser the title of the *cestui que trust*.
8. ——— : ———. A sale under the naked power contained in a deed of trust must be made in strict compliance with the terms and conditions prescribed in the deed.
9. ——— : SALE, CHANGE OF TIME OF : NOTICE. Where the day of sale of property advertised to be sold under a deed of trust is changed, the notice of sale must be published for the full time required by the terms of the deed of trust, after such change is made.
10. **Practice : DEMURRER.** A defendant who stands on his overruled demurrer and appeals is as much bound by the admissions of the demurrer in the appellate court as he was in the trial court.
11. ——— : FORECLOSURE OF MORTGAGE : PARTIES. Persons interested in the subject-matter of a suit in equity to foreclose a mortgage may be joined as plaintiffs though their interests are different.
12. ——— : CAPTION OF AMENDED PETITION : OMISSION OF NAME. The omission of the name of a party defendant from the caption of an amended petition is not material where such name appears in the body of the petition.
13. ——— : FORECLOSURE OF MORTGAGE : RECEIVER. The court in a suit in equity to foreclose a mortgage has the power to appoint a receiver to manage the property, where the defendant is insolvent and the property is insufficient to pay the debt.

Appeal from St. Louis City Circuit Court.

AFFIRMED.

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M. Kinealy and Jas. R. Kinealy for appellants.

(1) If the sale was void, as alleged, Hughes and G. P. Wolff, or G. P. Wolff alone, became the legal owner of the mortgage. *Brown v. Smith*, 116 Mass. 108; *Jackson v. Bowan*, 7 Cowen, 13; *Vroom v. Ditmas*, 4 Paige, 526; *Robinson v. Ryan*, 25 N. Y. 370. (2) There was no equitable relief necessary to put plaintiff, Geo. P. Wolff, in a position to institute a suit for a foreclosure of the deed of trust, if it was still in force, and hence the foreclosure was purely at law, and respondent was entitled to a trial by jury. *Smith v. Finn*, 77 Mo. 499; *Nolan v. Brewster*, 17 Mo. App. 497; *Fithian v. Monks*, 43 Mo. 502; *Mason v. Barnard*, 36 Mo. 384. (3) The court, therefore, erred in refusing a change of venue on the respondent's application, grounded on undue influence over the inhabitants of the city, the application being in due form. *Dowling v. Allen*, 88 Mo. 300. (4) The court should have granted the second application for a change of venue. *Dowling v. Allen*, 88 Mo. 300. (5) The petition stated no cause of action, because the sale by Wolff, trustee, has not been declared void for want of sufficient notice, or at all, and it does not appear that appellant is objecting to that notice and respondents will not be heard to do so. Dillon on Sales under Deeds of Trust; 2 Am. Law Reg. (N. S.) sec. 37, p. 739; sec. 28, p. 721; and cases cited; *Greenleaf v. Queen*, 1 Ret. 138; *Beebe v. De Baum*, 3 Eng. 510; *Echols v. Dimmick*, 2 Stew. 144; *Foster v. Gorie*, 5 Ala. 428; *Gift v. Anderson*, 5 Humph. 577; *Hall v. Harris*, 11 Tex. 300; *Wightman v. Doe*, 24 Miss. 675. Moreover, the notice given by Wolff, the trustee in the deed of trust, was sufficient, and the sale was not void for want of notice. No one could have been, or was, misled by it. *Gray v. Shaw*, 14 Mo. 341; *Powers v. Kruckhoff*, 41 Mo. 425;

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Stephenson v. January, 49 Mo. 465. And the change of date from Monday, May 22, to Monday, May 23, made so soon after the first insertion, did not avoid the sale. *Sayles v. Smith*, 12 Wendell, 60; *Jackson v. Clark*, 7 Johns. Rep. 225; *Dana v. Farrington*, 4 Minn. 437; *Bennett v. Brundage*, 8 Minn. 432; *DeJarnett v. DeGiverville*, 56 Mo. 440; Jones on Mortgages, sec. 1874. (6) The order appointing the receiver was erroneous, because, after the application for change of venue was filed, the court should not have done anything in the case save to allow the change, and every subsequent act of the court is erroneous. *Colvin v. Six*, 79 Mo. 198; *State v. Daniels*, 66 Mo. 192. And it was improper to sequester the rents, before foreclosure, as it does not appear that any lien was given on them by the terms of the deed of trust. 1 Jones on Mortgage, secs. 771, 772. Until foreclosure, the rents belong to the mortgagor. *In re Ass'n*, 96 Mo. 632. It was erroneous and oppressive to oust respondent from her home by a mere interlocutory order, made on an *ex parte* hearing, and without any right of appeal from the order. *Callanan v. Shaw*, 19 Iowa, 183; *Morrison v. Buckner*, Hemp. 442; *Hackett v. Snow*, 10 Ir. Eq. 220. And such an order was further erroneous on proceedings to foreclose the deed of trust described in petition. *Oliver v. Decatur*, 4 Cranch C. C. 455; *Berney v. Sewell*, Jac. and W. 1647; *Ackland v. Gravener*, 31 Bear. 55. (7) Marcus A. Wolff had no interest in the property; he was merely a trustee to sell and execute a power, and was not a proper party to this suit. *Rogers v. Tucker*, 94 Mo. 352. (8) There is a misjoinder of parties plaintiffs; Hughes is not a necessary party. See cases cited under point 1, *ante*. (9) Edward Ward was not retained as a party defendant in the amended petition, but he was, of course, a necessary party. The omission of the name from the title is bad on demurrer, and it is not supplied by any sufficient allegation in the body of the petition. Bliss on Code Plead., sec. 145. (10) The appellant

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was oppressed and injured, and was put to unnecessary cost and expense, and deprived of her constitutional right of trial by jury, by the erroneous action of the court below.

Ellerbe & Hicks for respondents.

(1) The petition stated a case in equity ; the relief sought, and to which plaintiffs were entitled under the facts alleged, could not be obtained at law. Hence, the cause was not triable by a jury, and the change of venue, asked on the ground of "undue influence over the inhabitants," was properly refused. *Lee v. Smith*, 84 Mo. 304. (2) The application for change of venue, on the ground of plaintiffs' "undue influence over the mind of the judge," shows, on its face, that knowledge of such influence came to the applicant at the time of the institution of the suit, and before any steps were taken therein by such applicant. Subsequent to such knowledge, various steps were taken by the applicant in the cause, and various matters presented to the court for consideration. The court was in constant session, and no reason appears or was given for appellants' delay in making such application. Under such circumstances, the application was properly denied. *State ex rel. v. Matlock*, 82 Mo. 455. Whether the application was made as soon as practicable after information received, is a question resting in the sound discretion of the trial court. *State v. Matlock*, cited *supra*. The same application for change of venue was considered by the St. Louis court of appeals, upon a petition for a writ of prohibition against the trial judge. *State ex rel. v. Lubke*, 29 Mo. App. 555. (3) The sale by the trustee was invalid by reason of the defect in the notice, it not having been published the required number of days. Whether invalid or not, since it stands admitted that appellants have constantly asserted its invalidity, they should not be heard to assert its validity. (4) The trustee's

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sale being invalid, the cancellation of the trustee's deed and of the deed of trust subsequently made to Hughes, was essential to a new sale. Upon the faces of such deeds and the record thereof, they appeared regular and valid, and divested the title of the trustee and appellants. No sale, either upon foreclosure or upon re-execution of the power of sale, could have been made with fairness to appellants or respondents. While such deeds remained apparently in force, no purchaser could have been found. (5) Under the facts alleged, plaintiffs were entitled to a cancellation of the deeds referred to, and to an accounting and judicial ascertainment of the sums due them, and to a sale of the mortgaged premises. A judicial determination of these matters was necessary to a final adjudication of the rights of the parties, and to afford complete relief. All the parties concerned in the title to the mortgaged premises were proper parties. *Henry v. McKerlie*, 78 Mo. 416, and cases there reviewed; *Mastin v. Halley*, 61 Mo. 196; *Jones v. Mack*, 53 Mo. 147; *Beedle v. Mead*, 81 Mo. 297; 2 Pomeroy, Eq., sec. 834. (6) Appellants made no objection and saved no exception, as to the appointment of a receiver, nor is any of the evidence upon which the court below made the appointment preserved in the record. Hence, the propriety of such appointment will not be reviewed upon appeal. The receiver was properly appointed. High on Receivers, secs. 643, 646; *In re Life Ass'n*, 96 Mo. 637; *Cox v. Volkert*, 86 Mo. 505. (7) The mere omission from the caption of an amended petition of the name of one of the defendants is of no significance. Although Edward Ward is not named in the caption, he is named and retained as a defendant throughout the body of the petition. *State ex rel. v. Patton*, 42 Mo. 537, cited in Bliss on Code Pleading, sec. 145; *Headlee v. Cloud*, 51 Mo. 301; *Fugle v. Hobbs*, 42 Mo. 537. (8) It is submitted, that the decree as entered below was proper, and that the objections now urged are captious and without substantial merit.

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THOMAS, J.—On January 20, 1888, the plaintiffs filed their petition in this cause on which summons was issued and served on Catherine Ward and Edward Ward, defendants, on the same day (Friday). The case was assigned to courtroom number 1.

The original petition is not sent up in the record, and, hence, we are not able to determine what it contained, but we have a right to presume, and the argument of the appellants' counsel in this court virtually concedes, that it set forth, substantially, the same cause of action against the defendants, as is set forth in the amended petition. On the twenty-third day of January, defendant, Catherine Ward, filed her application for change of venue from the city of St. Louis, on the ground that the opposite party had an undue influence over the minds of the inhabitants of that city, to the extent that she could not have a fair trial therein. This application was by the court overruled, presumably on the ground that this was a suit in equity, and, as defendants were not entitled to a trial by jury, it made no difference about the prejudice of the people. Thereupon the plaintiffs applied for the appointment of a receiver, and at the instance of defendant, Catherine Ward, this was continued to January 31, and on that day she filed an application for a change of venue, on the ground of the undue influence of the opposite party over the mind of the judge. In this application, she avers that knowledge of this undue influence came to her "about the last part of the week before last." This application was also overruled. On the same day the court made an order appointing Leslie A. Moffett receiver, to take charge of and manage the property in controversy during the litigation.

On the twentieth day of March, plaintiffs filed an amended petition, as follows:

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"George P. Wolff, James B. Hughes, Marcus A. Wolff,	Plaintiffs,	}
v.		
"Catherine Ward, Edward T. Farish, Mary Sweeney,	Defendants.	}

"The above-named plaintiffs, for their amended petition, state, that heretofore, to-wit, on the ninth day of October, 1880, one Rosanna Manley, then being the owner of the realty hereinafter mentioned, by her certain deed of trust of said date executed by her, which deed is recorded in book 642, on page 247 thereof, in the office of the recorder of deeds of the city of St. Louis, conveyed to plaintiff, Marcus A. Wolff, as trustee for plaintiff, James B. Hughes, the following described premises situated in the city of St. Louis, state of Missouri, to-wit:

"A lot of ground in block number 139 of said city, and more particularly described as follows: Beginning in the west line of Sixth street, distant one hundred and forty-four feet south of the south line of Wash street, thence running west at right angles with Sixth street, one hundred and twenty-seven feet, six inches, to the east line of an alley, fifteen feet wide, thence south along said east line of said alley, twenty-one feet, six inches, more or less, thence east one hundred and twenty-seven feet, six inches, to the west line of Sixth street, thence north along the west line of Sixth street, twenty-one feet, six inches, to the place of beginning, with buildings and improvements thereon.

"That said conveyance was to said M. A. Wolff in trust to secure to said James B. Hughes, the party of the third part therein, the payment of seven promissory notes therein described, given for money borrowed of him by said Rosanna Manley, of even date of said deed, payable to the order of James B. Hughes, and bearing interest from maturity at ten per centum

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per annum, one of said notes, the principal, being for the sum of \$5,000, and payable three years after date, and the others being semi-annual interest notes, each for the sum of \$200, and payable, respectively, in six, twelve, eighteen, twenty-four, thirty and thirty-six months after date.

“That in and by said deed said Rosanna Manley did covenant and agree with said party of the third part therein, his indorsees and assignees, among other things, to cause all taxes and assessments, general and special, then existing against said property to be paid on demand, and all such thereafter levied or charged on it or therefor to be paid within the times required by law, and also to keep the improvements upon said premises constantly insured, until said notes should be paid, in the sum of not less than \$5,000, and to keep constantly assigned or pledged and delivered to the party of the second part therein, said trustee, for further securing the payment of said notes, all and every policy or policies of insurance held by or issued to her upon said improvements, and also that, if any or either of said agreements should not be performed as aforesaid, then the said third party or his indorsees might effect such insurance for such purpose and pay such taxes, and for repayment of all moneys paid in the premises and interest thereon the said conveyances should be a security in like manner and with like effect as for the payment of said notes.

“That it was further provided in said deed of trust as follows: ‘Now, if said notes be paid when they become due and payable, respectively, and said agreements be faithfully performed, as aforesaid, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of said party of the first part; but if default be made in the payment of said notes, any or either of them, when they become due and payable, or in the faithful performance of any or either of said agreements as aforesaid, then this deed shall

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remain in force, and the said party of the second part, or in case of his death, inability or refusal to act, or absence from the said city of St. Louis, when authorized to sell under these presents, and a sale be desired by the holder of said notes, any or either of them, then the sheriff of St. Louis City, Missouri, for the time being, or such other person as may be thereto appointed by any court having jurisdiction of the property hereinbefore described (who shall thereupon become his successor to the title of said property, and the same become vested in him, in trust for the purposes and objects of these presents, and with all the powers, duties and obligations thereof), may proceed to sell the property hereinbefore described, or any part thereof, at public vendue to the highest bidder for cash, at the eastern front door of the courthouse, in the said city of St. Louis, first giving twenty days' public notice of the time, terms and place of sale, by the advertisement in some English newspaper, printed and published in said city of St. Louis; and upon such sale shall execute and deliver a deed in fee simple of the property sold to the purchaser or purchasers thereof (all the recitals whereof shall be *prima facie* evidence of the facts therein set forth), and receive the proceeds of said sale, out of which he shall pay, first, the cost and expenses of executing this trust, including a reasonable compensation to the trustee for his services, to be not less than \$25 in any case, and next to the payer thereof, upon the usual vouchers therefor, all moneys paid for insurance and taxes and judgments upon statutory lien claims as hereinbefore provided for, when not paid as hereinbefore agreed, and interest thereon at the rate of ten per cent. per annum from the times of their payment; and, next, of such of said interest notes as are due and unpaid, and all interest earned thereon; and, next, if enough therefor, said principal note whether due or not, and all interest earned therefor and thereon; and, if enough therefor, then apply towards their payment what there is, and in

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case all said demands be fully satisfied, from said proceeds, and any of said interest notes, the same shall be canceled, and the balance of said proceeds, if any, shall be paid to the said Rosanna Manley or her legal representatives.'

"Plaintiffs further state that thereafter on the fourteenth day of October, 1880, said Rosanna Manley, by her deed of trust of the last-named date, conveyed said premises to defendant, Edward Ward, and his successors in trust forever, in trust for the sole and separate use of his wife, the defendant, Catherine Ward, the daughter of Rosanna Manley, which deed is recorded in said recorder's office in book 642, at page 265 thereof; that said defendant, Catherine Ward, in and by such deed, did agree, as a part of the consideration thereof, to assume all deeds of trust then upon said premises in such deed conveyed, and the said Edward and Catherine Ward ever since the last-named deed have been, and now are, entitled to said premises subject to the deeds of trust herein mentioned and claim to be the owners of said premises.

"Plaintiffs say that the defendants, Edward T. Farish and Mary Sweeney, claim to have some interest or estate in said premises, and for that reason are made parties defendant herein.

"Plaintiffs state that the several interest notes mentioned in said deeds of trust were paid, but that the said principal note of \$5,000 was not paid at its maturity, and the plaintiff Hughes ever since the execution of the last-named note hath been and now is the holder thereof.

"Plaintiff states that there was executed in duplicate by said Hughes on the one part and said defendants, Edward and Catherine Ward, on their part, the following instrument:

" 'ST. LOUIS, October 9, 1883.

" 'Received of Edward and Catherine Ward their six negotiable promissory notes, dated October 9, 1883,

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executed by said C. and E. Ward, drawn to the order of James B. Hughes, and payable in six, twelve, eighteen, twenty-four, thirty and thirty-six months after date, respectively, which said notes, if promptly paid at maturity, respectively, and only when paid, shall be in lieu of seven-per-cent. semi-annual interest accruing on a certain note of Rosanna Manley for the principal sum of \$5,000, dated October 9, 1880, due and remaining unpaid, and secured by deed of trust on same date, executed by said Manley to M. A. Wolff, trustee, and recorded in the recorder's office of St. Louis City in book 642, page 247.

“ ‘Now, if the said notes for the sum of \$175 each, be promptly paid as they severally become due, respectively, then the payment of said principal note, for the sum of \$5,000 as aforesaid shall (at the request of said E. and C. Ward, as evidenced by their signature thereto) be extended for the period of thirty-six months from the ninth day of October, 1883.

“ ‘But if the said notes for the sum of \$175, each or any of them, or any part of either, be not promptly paid when due, or if said Ward shall neglect or refuse to faithfully perform the covenants in said deed of trust, as to insurance and the payment of taxes, as therein provided, then, in either of such cases, this agreement shall be null and void, and the legal holder of said principal note for \$5,000 may proceed to enforce payment thereof under said deed of trust, the same as if this agreement had not been made.’ Signed in duplicate.

“That the defendant Ward executed and delivered to Hughes the several notes mentioned as being made by them in the instrument last described; that, since the institution of this suit, plaintiffs have been informed and now so aver that said Rosanna Manley died in said city where she resided, in June, 1886, leaving no property belonging to her.

“Plaintiffs state that the defendants and Rosanna Manley failed and neglected to pay state or city taxes

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levied and assessed on said premises for the years 1884, 1885, 1886, so that the same became and remained delinquent. That there then was duly made and issued on the eighteenth day of September, 1886, in accordance with the charter of the city of St. Louis, a special tax bill of the last-named date in favor of J. Donovan & Co. in the sum of \$156.67, which became a lien on said premises, which bill the defendants failed to pay, satisfy or discharge; that the defendants Ward neglected and failed to pay, or cause to be paid, when the same became due, the last of the interest notes executed by them, to-wit, the interest note payable thirty-six months after date, on the ninth of October, 1883, and maturing on the ninth of October, 1886.

“That the defendants and Rosanna Manley neglected and failed to pay the principal note of \$5,000, made by Rosanna Manley, or any of the interest earned thereon, save in so far as such interest was paid by payment of the first five interest notes made by said Wards as above mentioned; and that said general and special taxes and the interest and penalties thereon, and the said thirty-six months’ Ward interest note, and the said note of \$5,000 made by Rosanna Manley and the interest accrued thereon, have never been paid, satisfied or discharged by the defendants or any of them, or for them, except as hereinafter stated, and that the defendants and Rosanna Manley failed to keep the improvements insured as provided by the deed of trust aforesaid; that the said taxes and notes last mentioned remaining unpaid, plaintiff, M. A. Wolff, as trustee in said deed of trust, at the request of said Hughes, caused said premises to be advertised for sale by notice, giving time, terms and place, published in the *Missouri Republican*, a newspaper printed and published in the city of St. Louis.

“That said advertisement, as originally published on the thirtieth day of April, 1887, and as published on the first, second and third days of May, 1887, by mistake

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and inadvertence gave notice for a sale to be had on Monday, May 22, instead of Monday, May 23, 1887, the day intended by said trustee; that, discovering said mistake, said trustee caused said notice to be changed, so that as published daily from May 4 to May 23, 1887, both inclusive, it gave notice of a sale to be had on Monday, May 23, 1887, so that said notice, as corrected, was published but nineteen days, excluding the day of sale, before the sale had on the twenty-third day of May, 1887.

“That, believing said notice so published to be sufficient and his actions thereunder valid and proper, said trustee proceeded to sell said premises in accordance with the terms of said deed of trust and said notice. and at such sale, plaintiff, George P. Wolff, was the highest bidder at the sum of \$4,250, and said premises were sold to him; that, thereafter, said trustee, in accordance with the terms of said deed of trust, executed a deed as trustee thereunder to said George P. Wolff, purchaser at said sale, conveying said premises to said George P. Wolff, which said deed is dated the twenty-third day of May, 1887, and is recorded in book 831, at page 145, of said recorder's office; but that said defect in said notice does not appear in said deed last mentioned.

“That plaintiff, George P. Wolff, believing that he had acquired good title to said premises under said sale, proceeded to pay off and discharge the liens for general and special taxes, paying, in discharge of the general taxes of 1884, 1885 and 1886, the thirtieth day of June, 1887, the sum of \$496.76, and in discharge of the special tax bill on the twenty-third day of August the sum of \$176.50; that he further caused said premises to be insured, paying as premium therefor on the third day of August, 1887, the sum of \$45, and that he expended for necessary repairs on said premises the sum of \$34.85 between the seventeenth day of September and the thirtieth day of September, 1887.

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"Plaintiffs state that the said George P. Wolff, believing that he had good title as aforesaid, borrowed from said Hughes, and the said Hughes, believing that George P. Wolff had good title as aforesaid, loaned to said George P. Wolff the sum of \$5,000, on the faith and security of said premises, to secure which indebtedness said George P. Wolff and Alice, his wife, made their certain deed of trust of date May 23, 1887, conveying to M. A. Wolff, trustee of James B. Hughes, the said premises to secure the payment of seven promissory notes made by said George P. Wolff of even date therewith, payable to the order of said James B. Hughes, one for the principal sum of \$5,000, the others being for semi-annual interest to be earned thereon at rate of six per cent. per annum, which notes said George P. Wolff then made and delivered to said Hughes.

"That said premises at the time of the deed to George P. Wolff were occupied by a number of tenants then holding under the defendants Ward, some of whom thereafter attorned to said George P. Wolff, and said George P. Wolff has collected rents from said tenants, so attorning, amounting to — dollars, for which he now stands ready to account.

"Plaintiffs state that the defendants, other than Farish and Sweeney, have, since sale, constantly asserted said sale to be void and instituted a suit against the plaintiffs to set the same aside, but such defendants did not prosecute the same and dismissed their suit when it was called for trial.

"That the defendants, other than Farish and Sweeney, have refused to surrender possession of the premises to said George P. Wolff, and have aided and assisted the occupants of said premises in resisting steps by said George P. Wolff, to obtain possession of said premises; the defendants, other than Farish and Sweeney, claiming, and causing such tenants to claim, that the said sale to George P. Wolff was void.

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“Plaintiffs say that they have offered to defendants, other than Farish and Sweeney, to reconvey to them said premises, and to satisfy their said debts and are now ready so to do, upon payment by defendants to plaintiffs of the debts secured by said Manley deed of trust, and the expenditures made by Geo. P. Wolff, as aforesaid.

“Plaintiffs say that though, at the times hereinbefore stated, they believed the said sale and proceedings thereunder to be valid yet they are now advised by counsel, and so aver, that by reason of said mistake and defect in said notice of sale, that said sale by said trustee, to George P. Wolff, under said deed of trust from Rosanna Manley was void.

“Plaintiffs say that the defendants Catherine and Edward Ward have no means or property save such interest as they may have in the premises described; that the defendants Edward and Catherine Ward, notwithstanding said sale, ever since hath been, and now are, collecting large rents from said premises which they convert to their own use, and they have not paid, or offered to pay, anything towards either principal or interest of their indebtedness.

“Plaintiffs say that said premises are and will be insufficient in value to pay the debt secured by the first-mentioned deed of trust, and that, upon foreclosure thereof by sale, a portion of said debt will remain unpaid.

“Plaintiffs further aver that, unless said rents be collected and applied towards payment of the debts secured by said deed of trust from Rosanna Manley, the plaintiff will be wholly without remedy for the collection of such portion of the indebtedness remaining unpaid after the sale of the premises as hereinafter prayed.

“To the end therefor, that the said deed of trust from Rosanna Manley may be foreclosed for the payment of said debts secured thereby, the plaintiffs pray

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that a receiver heretofore appointed to take possession of the premises hereinbefore described, and collect the rents and profits ensuing therefrom until the further order of this court may continue to hold possession and collect such rents; that the said deed from M. A. Wolff as trustee to Geo. P. Wolff, and the said deed from George P. Wolff and wife to M. A. Wolff, trustee of James B. Hughes, be set aside; that an account be taken of the principal and interest of the sums due from defendants, and each of them, and said Rosanna Manley, by reason of the matters hereinbefore alleged, and that the plaintiff, Geo. P. Wolff, and James B. Hughes have judgment for the respective sums so ascertained and costs herein to be levied on the premises hereinbefore described as is provided in the statutes of Missouri; that if, upon such sale of said premises, sufficient be not realized to satisfy such judgment, interest and costs, that the said receiver pay to the plaintiffs from the funds in his hands the residue of such judgment or apply said funds towards said residue; that if there be then a residue of such judgment, that such residue may be levied of other goods, chattels, lands and tenements of the defendants; that, upon sale of said premises, possession of said premises may be delivered by said receiver to the purchaser thereof, and that plaintiffs be granted such other and further relief as to the court may seem meet and proper in the premises."

On April 4, 1888, the cause was, by consent, transferred to courtroom 2, and next day a demurrer was filed to the amended petition assigning as grounds of demurrer:

"*First.* The petition failed to state facts constituting a cause of action.

"*Second.* There is a misjoinder of causes of action in the petition.

"*Third.* There is no equity in the bill.

"*Fourth.* There is a misjoinder of parties plaintiff.

"*Fifth.* There is a defect of parties defendant."

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This demurrer was overruled and defendant, Catherine Ward, refused to plead further, judgment was given against her May 1, and the court rendered a final decree, and finds all the allegations of the amended petition to be true. The final judgment was entered July 3. It finds there is due Hughes, mortgagee, \$6,115.06 for principal and interest, of the debt due on the Manley notes, secured by deed of trust, to his trustee, M. A. Wolff. Finds there is due to Geo. P. Wolff, \$683.20 for taxes and insurance paid by him, after charging him with rents collected by him. Finds \$635.21 due Mary Sweeney. It sets aside "and for naught" holds the deed of Marcus A. Wolff, trustee to Geo. P. Wolff, and the deed of trust of Geo. P. Wolff and wife to Hughes' trustee. Orders the sheriff to sell the property and out of the proceeds, *first*, pay all costs; *second*, pay Geo. P. Wolff amount found due him; *third*, pay Hughes the amount found due him; *fourth*, pay Mary Sweeney the amount found due her. Orders the receiver to turn over the possession of the property to the purchaser, and ordered the sheriff to hold the surplus subject to the order of the court. Defendants, Catherine Ward and Edward Ward, appeal. No motion for rehearing or new trial was filed, nor is there any bill of exceptions, and the case before us is on the record proper.

The grounds urged in this court for a reversal of the judgment are: *First*. That the court erred in overruling the application for a change of venue on account of the undue influence of the opposite party over the minds of the inhabitants of St. Louis. *Second*. That there was error in overruling application for change of venue on account of the undue influence of the opposite party over the mind of the judge presiding in courtroom number 1. *Third*. That the petition does not state a cause of action, and that there is a misjoinder of plaintiffs. *Fourth*. That defendant Edward Ward's name was omitted from the caption of the amended petition, and he was, therefore, not a party to the suit, and it was

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error to proceed without him. *Fifth*. That the court committed error in appointing a receiver.

The record shows that defendant, Catherine Ward, excepted to the action of the court in overruling her application for change from the people and the judge. These applications do not constitute a part of the record proper. *Stearns v. Railroad*, 94 Mo. 317, and cases cited. And this court will not review the action of the court thereon unless exceptions were saved and the matter brought to the attention of the court by motion for new trial. *Railroad v. Carlisle*, 94 Mo. 166, and cases cited.

As to the action of the court in the appointment of a receiver, there was no exception, and the matter not having been called to the attention of the trial court by motion for new trial, it cannot be reviewed on the record before us. As to the application for a change of venue from the judge, however, we will say that the matter rests largely in the discretion of the court, and in this case the application was made eight or ten days after knowledge of the cause for which the change came to the applicant, and it was for the court to say whether the application was timely or not. *State ex rel. v. Matlock*, 82 Mo. 455; *State ex rel. Ward v. Lubke*, 29 Mo. App. 555.

This last case was an application by Mrs. Ward for a writ of *mandamus* to compel the judge to grant her a change of venue in this case. It was refused by the court of appeals. This refusal to grant a change of venue from courtroom number 1 did not operate to the prejudice of defendants, however, in this case, because it was on stipulation transferred to another room for determination. As to the other application for a change of venue, and the action of the court in the appointment of a receiver, we will say, that the questions discussed are necessarily involved in the determination of the demurrer filed by appellant, Catherine Ward, and by the court overruled.

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If the petition in this case is held to be a bill in equity, and states facts sufficient to constitute a cause of action, then it is conceded that the application for change of venue on account of undue influence over the minds of the people ought to have been overruled, and in that case there is no question that the court had jurisdiction to appoint a receiver, there being an allegation that the respondents were insolvent and the property not worth the debt. *In re Life Ass'n of America*, 96 Mo. 632; *Cox v. Volkert*, 86 Mo. 505; High on Receivers, 643-6; 2 Jones on Mort., sec. 1516, *et seq.*

This, therefore, brings us face to face with the issues presented by the demurrer. These are: *First*. Can a mortgagor resort to a bill in equity in Missouri for the foreclosure of a mortgage? *Second*. Can the petition in the case be held to be a bill in equity for the foreclosure of a mortgage, and does it state facts sufficient to constitute a cause of action? and *third*, has each of the plaintiffs an interest in the proceeding, and, if so, were they all properly joined as plaintiffs in the bill?

I. We think there is no question that parties may resort to a bill in equity in this state for the foreclosure of a mortgage. Counsel for appellants in their brief say: "It is true, the courts in certain cases in this state decree an equitable foreclosure, where a case for equitable relief exists, necessary to the effectuation of the foreclosure and so bound up with the case for foreclosure that it cannot be tried separately." It has often been held that a proceeding under the statute for foreclosure is a proceeding at law. 77 Mo. 499, and cases cited. But it has never been held that courts of equity had, by the statute, been deprived of jurisdiction, in proper cases, to afford relief. 21 Mo. App. 159. The general rule that these courts have jurisdiction in such cases is well established. 2 Jones on Mort., secs. 1443-1450.

II. Does the petition in this case state facts sufficient to constitute a cause of action in a court of equity

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which will authorize it to assume jurisdiction and grant relief? The demurrer admitted the facts well pleaded, and, as appellants stood on the demurrer, we will group together the salient facts thus admitted in order to determine whether they present a case for equitable relief. It is admitted by the demurrer that Rosanna Manley on the ninth day of October, 1880, executed a deed of trust on the property in dispute to M. A. Wolff, in trust to secure a note of \$5,000 to plaintiff, James B. Hughes, payable three years after date with interest after maturity at the rate of ten per cent. per annum; that, by said deed of trust, said Rosanna Manley covenanted and agreed to pay the taxes on the land from time to time as they became due; to keep the improvements on the property insured, till the note should be paid, in the sum of not less than \$5,000, and, if she did not do this, then said Hughes or his indorsees might insure the property and pay the taxes, and for repayment of the same hold the property as security; that, if the note was not paid when due, Wolff, as trustee, might sell the property at public sale at the eastern front door of the courthouse in the city of St. Louis, first giving twenty days' public notice of the time, terms and place of sale, by advertisement in some English newspaper published and printed in that city, and out of the proceeds of the sale pay, first, the expenses of the sale; and, next, to the payer thereof, upon the usual vouchers therefor, all moneys paid for insurance and taxes, and next the note secured by the deed of trust; that this deed of trust was duly recorded; that on the fourteenth day of October, 1880, said Rosanna Manley conveyed said property to defendant, Edward Ward, in trust for his wife, the defendant, Catherine Ward; that Ward and his wife agreed as a part of the consideration for this deed to pay all deeds of trust on the property, and that they are entitled to the premises subject to said deed of trust; that on the ninth day of October, 1883, defendants, Edward and Catherine

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Ward, agreed in writing with James B. Hughes to pay the latter six promissory notes payable in six, twelve, eighteen, twenty-four, thirty and thirty-six months from that date, each for \$175, which they gave him for the future interest on said note of \$5,000; that Rosanna Manley and defendants failed to pay the taxes on the property for the years 1884, 1885 and 1886, and that defendants failed to pay the note of \$175 falling due October 9, 1886, and that the interest on the note of \$5,000 was not paid after the latter date; that Wolff, as trustee, gave notice in the *Republican*, a newspaper published in St. Louis, that the property would be sold on Monday, May 22, 1887; that this notice was inserted in said paper the first, second and third days of May, 1887; that, discovering that May 22 fell on Sunday, the trustee changed the notice which was published May 4, so that the sale was set for Monday, May 23, 1887; that the notice as corrected was published for nineteen days only, instead of twenty; that, believing the notice sufficient, plaintiff, George P. Wolff, bought the property at the sale, bidding therefor the sum of \$4,250; that the trustee executed to said Geo. P. Wolff a deed for the property under the power contained in the said deed of trust, which was recorded, but the recitals in this deed did not show the change in the notice as stated; that Geo. P. Wolff, believing he had title to the property, paid the taxes on it up to August 23, 1887, amounting to \$673.26, and on August 3, 1887, he caused the improvements on the property to be insured for which he paid \$45, and that he made necessary repairs, costing him \$34.85; that, believing his title to the property to be good, he borrowed \$5,000 of said James B. Hughes, and gave the latter a deed of trust on the property to secure the same, defendant, Marcus A. Wolff, being the trustee in this transaction also; that defendants, Ward and wife have since the sale of the property to Geo. P. Wolff constantly asserted said sale to be void, and instituted suit against plaintiffs to set

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same aside, but failed to prosecute same; that defendants, Ward and wife, have refused to surrender possession of the premises to Geo. P. Wolff, and have aided and assisted the occupants of the premises in resisting steps by said Geo. P. Wolff to obtain possession thereof, and have claimed and caused their tenants to claim that the sale to Geo. P. Wolff was void; that plaintiffs had offered to reconvey to defendants, Ward and wife, the said premises and to satisfy their deed of trust, and were then ready to do so, upon payment by them to plaintiffs of the debts secured by said Manley deed of trust and the expenditures made by said Geo. P. Wolff; that, though he once believed the said sale valid, the said Geo. P. Wolff was then advised and averred that it was void, by reason of the said mistake and defect in the notice of sale; that defendants, Ward and wife, were insolvent, but they were collecting and using the rents derived from the premises and have not paid the principal or interest of the indebtedness, and that the premises were not of sufficient value to pay such indebtedness unless the rents were collected and appropriated to its payment.

In this connection it is well enough to state that defendant Farish was trustee in a deed of trust subsequent to the Manley deed of trust, to secure to defendant, Mary Sweeney, the payment of a sum of money which the court found amounted at the time of the trial to \$635.21.

Do these facts alleged by plaintiffs, and admitted by the demurrer, constitute a good cause of action in a court of equity? We think they do. It is conceded by appellants that the sale by the trustee, under the power given in the deed of trust in this case, whether valid or invalid, conveyed to Geo. P. Wolff the title of the *cestui que trust*. This is the unquestioned law. *Wilcox v. Osborn*, 77 Mo. 632, and cases cited; *Wells v. Lincoln Co.*, 80 Mo. 424.

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The points urged against the sufficiency of the petition as a basis for equitable cognizance are: *First*. That Geo. P. Wolff obtained a legal and valid title to the property by the sale in May, 1887, and hence his remedy for its recovery was ejectment. *Second*. That plaintiff, Geo. P. Wolff, having acquired the title of the *cestui que trust* to the property by the sale under the deed of trust, had a complete remedy at law for the foreclosure of the deed of trust, even admitting the invalidity of the sale. The first inquiry, then, is as to the effect of the sale by the trustee, May 23, 1887. Twenty days' notice was required by the terms of the deed of trust. The sale having been made under a naked power given in this instrument, the trustee must be held to a strict compliance with the terms and conditions prescribed.

The notice was published for the first time on the first day of May, 1887, and the day set for the sale was "Monday, May 22, 1887." The notice was inserted in the paper in this form the second and third days of May. Then the discovery was made that the twenty-second day of May fell on Sunday, and the notice was changed so as to read "Monday, May 23, 1887," as the day fixed for the sale. It is conceded that the notice thus corrected was not published twenty, but only nineteen, days before the day of sale. It is contended that the mistake in the notice as first published was clearly a clerical error and could not have operated to mislead anyone. If we could say positively that no one was misled by it, this position would be tenable. But we cannot take judicial notice, nor can we assume that no one was misled.

In *Dana v. Farington*, 4 Minn. 433, the notice was changed from the twenty-third to the twenty-fifth of May, and it was found by the jury that the mortgagor did not know of the change, though both notices were published in the same paper. The sale was held to be invalid.

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It is utterly impossible for us to know what construction would be put by the public upon the publication of this notice, before and after the correction. Some might see the first publication and not the subsequent ones, as in the case of *Dana v. Farington, supra*; some might construe the notice valid, some invalid. As a matter of law, therefore, we cannot say that this notice, as published, did not injuriously affect the bidding. The notice is required to be given, and the publication of it should be absolutely free from doubt. The mode of the publication should be such that there could be no room for construction as to its legality. Capital is timid. It can find investment, as a rule, upon securities involving no questions of doubt, and, in public sales of this character, any variance from the method of procedure prescribed in the instrument conferring the power to sell, whether formal, clerical or substantial, where men of ordinary business capacity might very well differ as to the effect of such variance, ought not to be tolerated by the courts. The terms prescribed are definite and certain, and there is no excuse for varying from them. The best interests of all concerned require strict conformity to the prescribed terms of the power. The freer the title to landed property is, the greater the probability is that it will bring its full value at public auction.

We do not deem the cases of *Gray v. Shaw*, 14 Mo. 341; *Powers v. Kueckhoff*, 41 Mo. 425, and *Stephenson v. January*, 49 Mo. 465, cited by appellants, as authorities applicable to the facts of the case at bar.

In the second place it is argued that a trustee has power to adjourn a sale and that the change in the notice in this case operated as an adjournment of the sale from May 22 to May 23. It may be conceded that at common law the trustee had power to adjourn a sale, if he deemed it to the interests of all concerned to do so, but in that event the adjournment had to be made *at the time and place* appointed for the sale. *Jackson v.*

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Clark, 7 Johns. 225; *Jones on Mort.*, secs. 1873, 1874; *Johnson v. Houston*, 47 Mo. 227; article by Judge DILLON, 2 Am. L. Reg. (N. S.) 721. The cases of *Sayles v. Smith*, 12 Wend. 57, and *Bennett v. Brundage*, 8 Minn. 432, relied upon by appellants, in support of the position assumed, were decided not upon the common law but upon statutes in New York and Minnesota, authorizing postponements of sales under deeds of trust, and *Westgate v. Handlin*, 7 How. Pr. 372, also cited by appellants, was decided upon the authority both of *Sayles v. Smith*, *supra*, and the statute, and besides that it was held that there was sufficient notice *after* the change.

On the other hand, however, the supreme court of Illinois, in *Griffin v. M. Co.*, 52 Ill. 130, and *Thornton v. Boyden*, 31 Ill. 200, has held that while a trustee may adjourn a sale yet, in case he does, he is required to give a new notice for the full time required by the terms of the trust deed. We do not deem it necessary to decide, whether the trustee would have power to appear at the *time and place* set for the sale in the notice and by a public announcement adjourn the sale to a future day and make a valid sale at such future day without giving any further notice than this public announcement, or not, for that was not done in this case. It will be time enough to dispose of that question when it arises. But in the absence of any statute on this subject in Missouri we hold that a trustee would have no power to adjourn a sale, *before the day of sale*, by simply changing the time at which the sale will take place. If the day of sale is changed, the notice must be published for the full time required by the terms of the trust deed, after such change is made.

But it is again urged that, "even if the sales were void, the plaintiffs in this case cannot question it by a suit. That remains for Catherine Ward and her only." A large part of the original brief and all of the brief in reply of appellants is devoted to the discussion of this

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position. Appellants' premises in the discussion of this question are false. They assume in this argument that the plaintiffs alone assert that the sale is void. This assumption is based on a misconception of the state of this record. The argument is that appellants are now estopped by the technical admission by demurrer of the facts set up in a petition. In this they are correct; *but so long as they stand on the demurrer, they are bound by this technical admission.* Mrs. Ward filed her demurrer and when it was overruled she refused to plead further and she is now before this court on that demurrer, and she is as much bound by the admission of the facts by that demurrer in this court as she was in the trial court. No one denies her right to have answered over and denied the facts, which her demurrer admitted simply for the purpose of the demurrer; but this she did not see proper to do. If she had filed an answer and insisted that the sale in question was valid, then the argument and the authorities cited by counsel would be in point.

Let us see then what appellants have admitted by the demurrer, in regard to the validity of the sale. In one part of the petition, after averring the execution of the deed by said Manley to Edward Ward in the trust for his wife, it is alleged that "said Edward and Catherine Ward ever since the last-named deed have been and *now* are entitled to said premises subject to the deeds of trust herein mentioned and claim to be the owners of said premises." The petition also avers that the said sale was void by reason of the mistake and defect in the notice mentioned. It is also averred that appellants "have since the sale constantly asserted said sale to be void;" that they "have refused to surrender possession of the premises to said George P. Wolff, and have aided and assisted the occupants of the premises in resisting steps by said George P. Wolff to obtain possession of said premises; the defendants * * * claiming and

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causing such tenants to claim that said sale to George P. Wolff was void."

Appellants must, therefore, be taken and held in the determination of this demurrer, as admitting: *First*. That they claim to own the property subject to the deed of trust. *Second*. That they claim that the sale to George P. Wolff was void. Both parties have, therefore, agreed that the sale is void, one averring it in *haec verba* and the other claiming it to be void. This removes the major premise of the syllogism of appellants' counsel, and his conclusion must of necessity go with it.

A court of law is not competent to deal with the subject-matter of this action. Many complications in regard to the title to the property in dispute and the interests of the several parties therein, which arose out of the transactions at and since the sale in May, 1887, so that no court, except one possessing the strong arm of equitable jurisdiction, could in one action or several grant full and adequate relief. There was Hughes holding a balance on the Manley deed of trust; there was George P. Wolff who had paid \$4,250 of the Manley deed of trust, and who had paid taxes and insurance since the sale, and here were George P. Wolff and Hughes and Marcus A. Wolff, all parties to the deed of trust given since the sale. Where was the *legal* title to this property under these conditions? The sale was irregular but George P. Wolff obtained some interest in the deed of trust and property covered by the deed of trust. *Wilcoxon v. Osborn*, 77 Mo. 621; *Honaker v. Shough*, 55 Mo. 472; *Jones v. Mack*, 53 Mo. 147; *Russell v. Whitely*, 59 Mo. 196. Under these circumstances, what title did he convey to Marcus A. Wolff as trustee of Hughes? The titles and interests of all the parties in and to the property were such, it seems, that there was no way out of the embarrassments and complications except through a court of equity.

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III. The third question propounded is: Has each of the plaintiffs an interest in the proceeding, and, if so, were they all properly joined as plaintiffs in the petition? The plaintiffs are George P. Wolff, James B. Hughes and Marcus A. Wolff. There can be no question about the interest of George P. Wolff in this controversy. He paid \$4,250, in the first instance, for the purchase of the property at a sale that he avers he thought was a valid one. In the second place he paid \$600 or \$700 for taxes, insurance and repairs of the property under the belief that his title was good. He obtained the interest of the mortgagee in the property by the sale made by the trustee, at least to the extent of \$4,250. But we will say no more in regard to *his* interest. This is conceded by appellants. We think James B. Hughes also had an interest in the controversy. Geo. P. Wolff had borrowed \$5,000 of him and had secured the payment of that sum by a deed of trust on the property in controversy. Hence he was interested in the title, in regard to that deed of trust. His interest in the first mortgage having been transferred by the sale in May, 1887, to Geo. P. Wolff, unless he could join with Wolff in obtaining a sale of the property to pay his debt, he would be cut off entirely if Wolff's title should be defeated by a sale under a foreclosure of the Manley deed of trust.

And we think Marcus A. Wolff a necessary party to the case, either as plaintiff or defendant. He, as trustee, held the title to the property by virtue of the Manley deed of trust as well as the Geo. P. Wolff deed of trust, and in order that there might be no question about the title under this foreclosure, it seems, that it was very appropriate, indeed, that he should have been joined in the action.

The interests of plaintiffs being different, were they properly joined as plaintiffs in the bill? Mr. Jones in his work on mortgages, section 1369, says: "It is not very material, however, in an equity suit, whether

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more than one of the persons interested in prosecuting it, is nominally made a plaintiff. It is generally sufficient that the persons to be bound by the decree shall be brought before the court in some capacity. When a person having an interest in the security is made a defendant in the action, the bill ought to show his refusal to join as a plaintiff; but his omission is not material unless such defendant objects by demurrer. If several persons have rights and interests in the same demand and security even if they are not strictly joint and are entitled to the same relief they should naturally join as plaintiffs in seeking relief. But if one of the persons so interested institutes the suit and makes the others having like interests defendants, the requirements of equity are generally satisfied. If several persons have claims alike in being antagonistic to the defendant, but several and distinct in their nature, because they have arisen out of different events and circumstances, although they may join as coplaintiffs in seeking the same relief, in actual practice one person, perhaps, by reason of his greater interest or more urgent occasion for relief, institutes the suit without asking the co-operation of the others, making them defendants, * * * it is not material that the interests of the several plaintiffs should be coextensive or that they should have originated at the same time. Neither is the extent of the interest material if there be any interest at all; or whether it be absolute or conditional."

The plaintiffs, though their interests in the controversy were not joint, but diverse even, were properly joined as plaintiffs.

IV. It is insisted that appellants were not interested in the deed of trust given by Geo. P. Wolff to Hughes' trustee, and, as the petition prayed to have that canceled, there was a misjoinder of causes of action. If Hughes and his trustee had not joined with Geo. P. Wolff in asking this to be done, there might be some

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force in the argument. But the three parties to that deed of trust join in a petition asking the court to set it aside on the grounds set out therein. This deed of trust was on property in which, as it is alleged, appellants had an interest. The plaintiffs had to do equity before they could ask relief. They prayed that this property might be sold to pay certain sums of money alleged to be due them and in order to obtain this relief against appellants they were required by every principle of fair dealing and equity to put the parties in *statu quo*, so that the title to the property, when sold, would be perfect beyond peradventure, and in order to be perfect it had to be freed from the complications in which it was involved by reason of the acts of the plaintiffs. As to this deed of trust there was no issue to be tried.

V. Another objection is urged that the name of Edward Ward was omitted from the caption of the amended petition and hence no judgment could be rendered against him. There is no merit in this objection. His name is often used in the body of the petition as a defendant, and it is evident from the whole record that the omission of his name from the caption of the petition was simply a clerical error. He was made a party to the action in the first instance; no order of dismissal as to him anywhere appears in this record and final judgment was rendered against him. The rule is to look to the body of the petition to ascertain its purport and sufficiency, and this shows beyond controversy that he was retained as a defendant. *Bliss*, Code Plead., sec. 156; *Fuggle v. Hobbs*, 42 Mo. 537; *Headlee v. Cloud*, 51 Mo. 301.

VI. Counsel for appellants complain of the action of the court in appointing a receiver and turning Mrs. Ward out of her home without a trial. Having found that this is a proceeding in equity, it follows, as we have said, that the circuit court had jurisdiction to appoint a receiver to take charge of the property, to

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manage it and collect the rents, there being an allegation of the insolvency of Ward and his wife, and of the insufficiency of the property to pay the debt. No exceptions were saved to the action of the court in this regard, and hence we cannot review it. But the facts appear to be that Mrs. Ward bought this property, and assumed to pay this deed of trust given by said Manley to Hughes; that she paid no interest on the debt after April 9, 1886, and failed to pay the taxes since the year 1883, as well as to have the property insured. She occupied the premises for a year after the failure to pay the interest and nearly three years after failure to pay the taxes and insurance. Hence, in looking at the conduct of Mrs. Ward in the light of the surrounding circumstances, and the facts as admitted in the petition, she cannot claim any special consideration of a court of equity. We sympathize with her in her inability to pay her debts; but she having voluntarily assumed the relation to this transaction that she now occupies, this court is unable to afford her relief, especially upon the record as presented to us. Judgment affirmed. All of division number 2 concur.

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 SNELL, *Plaintiff in Error*, v. HARRISON *et al.*

 DIVISION ONE.

1. **Fraudulent Conveyance: EJECTMENT.** A conveyance made in fraud of creditors is void and will not bar a recovery in ejectment.
2. **Mortgage: NOTICE OF SALE.** A mortgagee, whether directed or not by the mortgage, should give notice of sale by him.
3. **Fraudulent Conveyance: BADGES OF FRAUD.** An unusual method of transacting business is a badge of fraud.

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4. **Tenants in Common : PURCHASE OF OUTSTANDING TITLE.** While one tenant in common cannot buy in an adverse paramount title so as to oust his cotenant, yet it seems the foregoing rule is not applicable where the tenant buys in the independent interest of another tenant in common similarly situated as himself.
5. **Practice: NONSUIT.** While a plaintiff under our practice may take a nonsuit, a defendant cannot so as to prevent a part of the matter in litigation from being adjudicated.
6. **Bill of Exceptions : SEAL : JOINDER IN ERROR : WAIVER.** A bill of exceptions need not be sealed, and if so required an objection for that reason after joinder in error comes too late.

Appeal from Henry Circuit Court.—HON. JAMES B. GANTT, Judge.

REVERSED AND REMANDED.

A. Comingo and M. A. Fyke for plaintiff in error.

(1) The first instruction asked by plaintiff and refused by the court should have been given. *First* Defendants could not set up as an outstanding title a mortgage executed by themselves. *Laughlin v. Stone*, 5 Mo. 43; *Page v. Hill*, 11 Mo. 149; *Mathews v. Licompte*, 24 Mo. 545; *Gritchell v. Kreidler*, 12 Mo. App. 497; *Boyd v. Jones*, 49 Mo. 202; *Matney v. Graham*, 59 Mo. 190. *Second.* The deed made by Harvey Harrison was not effectual to foreclose the mortgage. (2) Plaintiff's second and third instructions should have been given. D. A. Glass by joining plaintiff in causing the land to be levied upon and sold as the property of Geo. W. Harrison, and by joining plaintiff in the purchase thereof, and in the suit to set aside the fraudulent conveyances made by Harrison, and by the decree in that case, was precluded from disputing that Harrison had the legal title to the whole eighty; and those claiming under Glass are likewise estopped. *Thistle v. Buford*, 50 Mo. 278; *Crispen v. Hannavan*, 50 Mo. 415; *Peery v. Hall*, 75 Mo. 503; *Stautmore v. Clark*, 70 Mo.

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471; *Hasenritter v. Kirchoffer*, 79 Mo. 239. It is established law that no man can be permitted to claim inconsistent rights with regard to the same subject, and whoever claims an interest under an instrument is bound to give full effect to that instrument as far as he can; a person cannot accept and reject the same instrument; or, having availed himself of it as a part, defeat its provisions in any other part. 1 *Leading Cases in Equity* [Hare & Wallace notes] 303. (3) The decree in the case of *Snell and Glass v. Geo. W. Harrison, Brunetta Harrison et al.* vested the title absolutely in Snell and Glass. Therefore, as between plaintiff and defendants, the decree in that case entitles plaintiff to recover seventenths of the whole land. *Caldwell v. White*, 77 Mo. 471; *Hotel Ass'n v. Parker*, 58 Mo. 327; *Bigelow v. Winsor*, 1 Gray, 299. (4) The court erred in admitting in evidence, against plaintiff's objections, the judgment in ejectment in case of *Snell and Glass v. G. W. Harrison*. The judgment in that case was no bar to this suit. *Ekey v. Inge*, 87 Mo. 493. (5) The court erred in admitting in evidence the mortgage executed by G. W. Harrison and wife to Harvey Harrison. Defendants could not set up this mortgage as an outstanding title against plaintiff. See cases cited under first point. (6) The court erred in admitting in evidence the deed executed by Harvey Harrison to Brunetta Harrison, because G. W. Harrison's equity of redemption could not be foreclosed in that manner; there is no power in the mortgage authorizing such sale, and without such power the mortgage could only be foreclosed by decree of court. R. S. 1879, sec. 3310.

Samuel P. Sparks for defendants in error.

(1) It is a familiar maxim of universal application, "that the possession of the tenant is the possession of the landlord." *May v. Luckett*, 48 Mo. 472; *Peutz v. Kuester*, 41 Mo. 447. *First*. Glass' deed to Mrs.

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Harrison made her and Snell tenants in common of the premises in controversy. *Second.* Snell could only recover possession in such interest in the premises as he had title to. *Third.* A judgment in ejectment between tenants in common is only declaratory of the rights and interests of the parties. *Gray v. Givens*, 26 Mo. 303; *Freeman on Coten. and Part.*, sec. 293. *Fourth.* The court in trial of this case proceeded upon the theories embraced in the foregoing propositions, which are only fundamental. (2) It is immaterial whether Brunetta Harrison acquired a perfect legal title or became merely the assignee of the Harvey Harrison mortgage of the south eighty; it being anterior to Snell's sheriff's deed was available to her as a defense in this collateral action at law. *Hubble v. Vaughn*, 42 Mo. 138; *Phyle v. Riley*, 15 Wend. 248; *St. John v. Bumstead*, 17 Barb. 100; *Johnson v. Houston*, 47 Mo. 227; *Howard v. Thornton*, 50 Mo. 291; *Jackson v. Magruder*, 51 Mo. 55. (3) After default in a mortgage of real estate, the mortgagee is entitled to the possession and can maintain ejectment therefor against the mortgagor and those claiming under him. *Reddick v. Gressman*, 49 Mo. 390; *Allen v. Ransom*, 44 Mo. 263; *Thornton v. Irwin*, 44 Mo. 153; *Pickett v. Jones*, 63 Mo. 195. The only interest G. W. Harrison had in the south eighty at the time of the rendition of the Snell-Glass judgment was an equity of redemption in a defaulted mortgage, which was swept away by the subsequent foreclosure. (4) The sale of the mortgaged premises by the mortgagee to Brunetta Harrison was a valid foreclosure of the equity of redemption of G. W. Harrison without public notice; since none was required by the instrument, the whole matter was left to the sound discretion of the mortgagee. R. S. 1879, sec. 3310; *Martin v. Paxson*, 66 Mo. 266; *Mowry v. Sanborn*, 68 N. Y. 153; 2 Jones on Mort. 1821, 1822. *First.* When there is a power of

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sale contained in a mortgage it is not necessary to resort to a judgment or decree to foreclose the equity of redemption. *Johnson v. Houston*, 47 Mo. 227. *Second*. However erroneous and irregular the foreclosure may have been, Mrs. Harrison became invested with the legal title. *Jackson v. Magruder, supra*. *Third*. No one can complain of the acts of the mortgagee in selling on credit, if such was an improvident act, but the mortgagee. He is the only one who could by any possibility be injured. 2 Jones on Mortg., sec. 1615. (5) The doctrine that a defendant in an execution cannot set up an outstanding title has no application to the facts of this case. G. W. Harrison is not asserting any title or right of possession in himself whatever as to the south eighty. The title and right to the possession he had at the time of the rendition of the Snell-Glass judgments had been swept away by the foreclosure prior to the institution of this suit. *McCormick v. Fitzmorris*, 39 Mo. 24. (6) The agreement between Snell and Glass, in regard to the purchase and taking deed jointly at their execution sale, did not have the effect either to divest Glass of the one-third interest which he claimed and held at that time as heir of George W. Glass, recovered in the equity suit against G. W. Harrison, nor did it debar or stop him from acquiring the equity of Mrs. Ray in the premises to set aside the administrator's deed to Geo. W. Harrison. The subject-matter of the agreement related wholly to the purchase of the interest of Geo. W. Harrison in the premises at the date of this execution sale. *Blodgett v. Perry*, 97 Mo. 263. *First*. Courts in arriving at the meaning and intention of parties to contracts will look at the situation of the parties and the circumstances attending the transaction. *Second*. The entire judgment roll must be looked to in determining what was adjudicated in the equity suit of Snell and Glass against Brunetta Harrison. It is silent as to the respective interests of Glass and Snell. Snell is in no situation to invoke the doctrine of estoppel.

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Blodgett v. Perry, supra. Third. But in that suit Snell and Glass were not adversary parties, neither could invoke the doctrine of estoppel by judgment. *McMahon v. Geiger*, 73 Mo. 145. (7) The contract between Snell and Glass, respecting the purchase at sheriff's sale, was in writing, and respecting land, and was entitled to record, but was not recorded. It could not affect Mrs. Harrison, who was shown to have been a purchaser for value without knowledge, notice or information of its existence. *Fox v. Hall*, 74 Mo. 315. (8) The deed of Mrs. Ray and husband to D. A. Glass operated to transfer to him her equity in the north eighty, which was a right to set aside the administrator's deed to George W. Harrison. This, in turn, Glass transferred to Mrs. Harrison by his deed of April 19, 1881, and delivered to her the possession of said tract. The assignment of property carries with it the equity to set aside the deed for fraud. *Smith v. Harrison*, 43 Mo. 557; *McMahon v. Allen*, 35 N. Y. 304; *Trayer v. Clews*, 22 Cen. L. J. (U. S. Supreme Court). This court ought, upon the record in this case, in the interest of justice and to prevent another suit, to modify the judgment of the circuit court, which allowed Snell to recover the Ray interest in the north eighty. (9) In an action of ejectment against a husband, the wife is a proper party defendant where she has an equity for the purpose of having the same litigated. *Atkinson v. Dixon*, 75 Mo. 394; *Dixon v. Givan*, 75 Mo. 516. The paper relied on as a bill of exceptions in this case was not sealed, nor did it recite that it was a part of the record. These were essentials to its validity. *Bank v. Pulitzer*, 11 Mo. App. 594. *First.* At common law it was essential to the verity of a bill of exceptions that it should not only be signed but sealed. Stat. Westmin, 213 Edw. 1 Ch. 31 (1285); 2 Tidd's Prac. 862; 1 Arch. Prac. by Chitty [11 Ed.] 443; 2 Bac. Abridgment (by Bouvier), 113; *Strother v. Hutchinson*, 4 Bing. (N. C.) 89; *Pomeroi's Lessee v. Bank*, 1 Wall. 592. *Second.* The

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paper relied on as a bill of exceptions does not purport on its face to be sealed, nor is there any scroll affixed to the signature of the judge. This was essential to constitute a sealing. R. S. 1879, sec. 662.

SHERWOOD, P. J.—On the twenty-second day of May, 1885, plaintiff brought ejectment for the east half of the southwest quarter and the west half of the southeast quarter of section 13, township 45, range 24, Johnson county, Missouri. This cause in another form, and with an additional plaintiff and with additional defendants, was before this court on a former occasion. 83 Mo. 651. The decree entered therein setting aside the title of the defendants to the land above described on account of fraud upon the creditors of G. W. Harrison and vesting the same in the then plaintiffs, Snell and Glass, bears date February 24, 1880, and the proceedings which resulted in that decree, afterwards affirmed in this court, were instituted the twenty-third day of May, 1878.

On the twenty-first day of October, 1885, defendant, G. W. Harrison, filed amended answer, in which he admits that on the first of June, 1880, plaintiff was entitled to the possession of the undivided seven-tenths of twenty-six and two-thirds acres of the premises sued for, being the south thirds of the northeast quarter of the southwest quarter and the northeast quarter of the southeast quarter of the said section 13. Defendant, states that he has not been in possession of the above described portions of said premises since April 1, 1885.

Defendant also alleges that on the fourth day of March, 1881, plaintiff obtained a judgment against defendant for the possession of said portion of said premises, and damages, and rent, and profits, which judgment remains in full force.

Defendant admits that he is in possession of the remainder of the premises in controversy. Defendant says that as to the northeast quarter of the southwest quarter, and the northwest quarter of the southeast

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quarter of said section 13, that one George W. Glass died intestate, seized and possessed in fee simple of said premises; that he left surviving him his widow, Rebecca Glass, and Lucinda Glass and David A. Glass, his only children.

That the estate of said George W. Glass was administered in Johnson county, Missouri, and that said widow filed in probate court of Johnson county her election in writing to take as a child in lieu of dower, whereby she became entitled to one-third interest in said premises; that Rebecca Glass, Lucinda Glass and David A. Glass afterwards, for the purpose of making partition of said premises, mutually agreed, in consideration of the release by the said Rebecca of all claims in and to the north two-thirds of said premises, she should take the south one-third of said tract and Lucinda and David should take the north two-thirds of said premises.

That afterwards Rebecca Glass sold to defendant, George W. Harrison, the said south one-third of the said tract, and that he immediately entered into the exclusive possession of said south third of said tract and continued to occupy the same with the knowledge and consent of the said Lucinda and David A. Glass; that afterwards the said Lucinda married one Joseph R. Ray; that afterwards in course of the administration of the estate of George W. Glass the said northeast quarter of the southwest quarter and the northwest of the southeast was ordered to be sold for the payment of debts.

That at said sale defendant, George W. Harrison, became the purchaser; the sale was approved and a deed made by the administrator conveying said land to defendant, George W. Harrison; that afterwards, in January, 1875, the said David A. Glass commenced a suit in the circuit court of Johnson county to set aside said administrator's deed, and to divest said Harrison of all title to said property which he acquired by virtue of said administrator's deed; that at the June term,

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1876, a decree was entered setting aside said sale and deed, as to the said David A. Glass, and divesting said Harrison of all title to said property as to the interest of the said Glass; that thereafter said Harrison did not assert or claim any title or interest in said lands by virtue of said administrator's deed; that on the twenty-ninth of January, 1879, the said Lucinda Ray and husband conveyed the undivided one-third interest in said tract to David A. Glass; that on the nineteenth of April, 1881, said David A. Glass, in consideration of \$400 paid him by *this defendant*, sold and conveyed all his right, title and interest in said tract to Brunetta Harrison, whereby she became the owner of the north two-thirds of said tract, and as such owner entitled to the possession thereof.

That said Brunetta Harrison purchased and paid said Glass for said north two-thirds of said tracts, relying upon the actions and conduct of said George W. Harrison, and his disclaimer of any interest in said tracts under and by virtue of said administrator's deed.

This defendant further says that on the fifteenth of February, 1878, the said David A. Glass and plaintiff J. R. Snell became the owners of all the title and estate of the said George W. Harrison in the said south third of said tracts by purchase at execution sale, upon judgments against said George W. Harrison; that at said sale said Glass became the owner of the undivided three-tenths interest in said tracts.

This defendant, as the husband of said Brunetta Harrison, holds and claims under her right and title. On the same day defendant, George W. Harrison, filed a motion asking that his wife, Brunetta Harrison, be made a party defendant. This motion was granted, and Brunetta Harrison filed her separate answer.

She admits that on the first day of June, 1880, plaintiff was and still is entitled to the possession of an undivided seven-tenths of twenty-six and two-thirds acres, being the south thirds of the northeast quarter of the

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southwest quarter and the northwest quarter of the southeast quarter of section 13, township 45, range 24. She disclaims all interest in said seven-tenths, as to the northeast quarter of the southwest quarter and the northwest of the southeast. She claims that she paid \$400 to Glass for his interest in the land; otherwise she sets up the same facts set up by George W. Harrison in his answer. She concludes her answer by alleging that she is the owner of the whole of the northeast quarter of the southwest quarter and northwest of the southeast quarter, saving and excepting an undivided seven-tenths of the south twenty-six and two-thirds acres off the south side thereof, which belongs to plaintiff except the inchoate right of dower therein of the defendant. She prays that upon a final hearing her rights, equities and interests in said northwest southeast and northeast southwest be ascertained and declared, and that plaintiff be debarred and stopped from having or claiming any interest therein, and for all equitable and proper relief.

Upon the application of defendants a change of venue was awarded to Henry county. Plaintiff filed a reply denying the matters alleged in the answers of defendants. The cause was tried September term, 1886, in the Henry county circuit court.

The decree referred to, caption included, is the following:

"John R. Snell and David A. Glass,	}	/
v.		
"Brunetta Harrison and Geo. W. Harrison, her husband, Chas. A. Harrison, Mary A. Harrison, Harvey E. Harrison, Nellie M. Harrison and Virgie Harrison, minor heirs of A. B. Harrison, deceased, defendants.	}	/

"Now at this day come the parties aforesaid by their attorneys and the motion of plaintiffs heretofore filed to set aside and disregard the finding of the jury

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on the issues submitted to them by the court, and to render a decree in pursuance of the prayer of said plaintiffs' petition in favor of plaintiffs coming on to be heard is taken up and submitted to the court, and the same, after being fully seen and heard, is by the court sustained and the findings of the said jury set aside, and the court, having seen and heard all the matters in evidence submitted in the cause, doth find: That on and prior to the thirtieth day of March, 1874, the defendant, G. W. Harrison, was the owner and in possession of the following described real estate, situated in the county of Johnson, and state of Missouri, to-wit: The east half of the southwest quarter and the west half of the southeast quarter and the northeast quarter of the southeast quarter of section 13, township 45, range 24, containing in all two hundred acres, and lots 7 and 8 in block 'M' in the railroad extension to the town of Knobnoster, and continued to own the same until the purchase thereof by the said plaintiffs at execution sale at the February term, 1878, of this court, and that the deed made by said G. W. Harrison and wife October 9, 1875, to A. B. Harrison, conveying the said two hundred acres of land for the purported consideration of \$2,000, was voluntary and void and made with the intent to hinder, delay and defraud the creditors of the said G. W. Harrison; that, at the sale on execution of said land in said section 13 and lots 7 and 8, on the judgment for costs, on the fourteenth day of October, 1876, the same was purchased by the said A. B. Harrison for the use and benefit of the said G. W. Harrison, and in fraud of the rights of the creditors of the said G. W. Harrison; that, at the sheriff's sale to Joel H. Warren on the eleventh day of October, 1877, under the four executions against the said G. W. Harrison, one in favor of J. W. Dawson, two in favor of John Snell and one in favor of D. A. Glass, the said real estate, except the said lot 8, was purchased by the said Joel H. Warren for the use of said G. W. Harrison

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and in fraud of the rights of the creditors of the said G. W. Harrison, and that said Joel H. Warren held said title by virtue of said purchase at said sheriff's sale for the use and benefit and in trust for the said G. W. Harrison, and the court further finds that the said Brunetta Harrison, wife of the said G. W. Harrison, took the conveyance of said real estate from the said Warren through his quitclaim deed dated January 24, 1878, with full knowledge of the indebtedness of said G. W. Harrison and held said land in trust for the said G. W. Harrison and in fraud of the creditors of said G. W. Harrison, and took and held said title with the intent to hinder and delay the creditors of said G. W. Harrison, and that the said A. B. Harrison, Joel H. Warren and Brunetta Harrison, each and all of them as volunteers, took the title to said real estate in the afore-said conveyances, and each held the same for the use and benefit of said G. W. Harrison with full and complete knowledge at the respective dates of said sales and purchases; that the said Geo. W. Harrison was largely indebted, and that his purpose was to place the title to his said real estate so that his creditors could not reach the same, and to hinder, delay and defraud them out of their just claims, and the court finds that said A. B. Harrison departed this life on the nineteenth day of June, A. D. 1877, and that said defendants, Charles H., Mary A., Harvey E., Nellie M. and Virgie Harrison are his children and heirs at law.

"And the court further finds that on and prior to October 9, 1875, the said G. W. Harrison was largely indebted, and at said date was owing one John Snell a note of \$600, dated March 30, 1874, upon which a suit was then (October, 1875) pending in this court by the said John Snell v. said G. W. Harrison, upon which judgment was finally rendered October 16, 1877, for \$700.35, against said G. W. Harrison; that in January, 1875, said D. A. Glass commenced his suit in this court against said defendant, G. W. Harrison, to set aside a

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certain deed as to one-third of eighty acres of the aforesaid land and to vest said interest in said Glass, wherein the court at its June term, 1876, set said deed aside as fraudulent as to said one-third interest in said eighty acres and vested same in said D. A. Glass, and at the October term, 1877, of this court in a suit of ejectment by said Glass against said Harrison for the possession of said one-third interest in said eighty acres, such proceedings were had that said Glass obtained judgment for possession of his interest and for \$300 damages for the detention of said premises; that afterwards executions duly issued upon above recited judgments, one in favor of John Snell for \$700.35 and costs, one in favor of said Glass for \$300 and costs, and were duly levied upon the aforesaid two hundred acres of land and said lots 7 and 8 as the property of said G. W. Harrison, and the same was by virtue of said executions sold at sheriff's sale to said plaintiffs February 15, 1878, and sheriff's deed therefor duly executed and delivered to said plaintiffs and that said plaintiffs are now the owners of said real estate.

"It is, therefore, ordered, adjudged and decreed by the court that the said deeds to said A. B. Harrison, Joel H. Warren and Brunetta Harrison each and all of them be set aside and held for naught, and that the title to said real estate, to-wit: East one-half of southwest quarter and west one-half of southeast quarter, and northeast quarter of southeast quarter, all in section 13, township 45, range 24, and lots 7 and 8 in block 'M,' railroad extension to the town of Knobnoster, all in Johnson county, Missouri, be divested out of and from the said defendants and each of them and that the same be fully vested in said plaintiffs, and that said defendants pay all costs accrued in this suit, and that execution issue therefor."

This decree was read in evidence by the plaintiff on the hearing of this cause, and, also, the sheriff's deed executed February 15, 1878, and recorded four

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days thereafter, which recites that on the twenty-sixth day of October, 1877, judgment was rendered in the circuit court of Johnson county, Missouri, in favor of David A. Glass and against Geo. W. Harrison for a \$300 debt, and \$17.73 costs, upon which an execution was issued, dated the twenty-fourth day of December, 1877; and delivered to said sheriff on the twenty-sixth of December, 1877, and that on the sixteenth of October, 1877, judgment was rendered in said court in favor of John Snell, and against Geo. W. Harrison for the sum of \$700.35 debt and \$87.35 cost, upon which judgment execution was issued December 21, 1877, and was delivered to the sheriff on the twenty-fourth of December, 1877; that on said twenty-fourth of December, 1877, said sheriff, by virtue of the execution in favor of Snell, levied upon the property described in the petition; that on the fourteenth of January, 1878, said sheriff levied the execution in favor of D. A. Glass on the same property. The sheriff's deed further recites in substance that by virtue of these two executions he sold the property; that at the sale the same was struck off to John R. Snell and David A. Glass, and he conveys to Snell and to Glass the east half of the southwest quarter and the west half of the southeast quarter, all in section 13, township 45, range 24, in Johnson county, Missouri, *i. e.*, seven-tenths to Snell, and three-tenths to Glass in said land.

Plaintiff then offered in evidence the following agreement:

"This contract or agreement, made by and between J. R. Snell and D. A. Glass, witnesseth, that the said parties have this day bought at execution sale, as the property of Geo. W. Harrison, the east half of the southwest quarter and the west half of the southeast quarter and the northeast quarter of the southeast quarter, all of section 13, township 45, range 24, and lots 7 and 8, in block 'M,' in the railroad extension to the town of Knobnoster, and all in Johnson county, state of

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Missouri. With this agreement between themselves, that whereas the said J. R. Snell represented the estate of John Snell, deceased, which had a judgment at the October term of the circuit court, A. D. 1877, of said county against said Harrison of over \$700, and the said Glass obtained a judgment of \$300 at the same term against the said Harrison, they have agreed that for the purpose of procuring and holding the said land, or getting money as the proceeds thereof, the said J. R. Snell shall and does own seven-tenths thereof, and the said D. A. Glass three-tenths thereof; each shall be responsible for the payment of costs, accrued in his own case prior to sale, but the costs after sale in procuring titles and possession of said land shall be borne by the said parties in the aforesaid proportions, to-wit: J. R. Snell shall pay seven-tenths, and D. A. Glass three-tenths thereof including the purchase money at said execution sale, but each party shall pay his own attorney fees.

“Dated at Warrensburg, Missouri, this fifteenth day of February, 1878.

“[Seal.]

JOHN R. SNELL.

“[Seal.]

DAVID A. GLASS.”

Plaintiff next offered in evidence the petition on which the decree aforesaid was obtained, but, as its statements are all contained in substance in said decree, it is unnecessary to repeat them.

In that case, Geo. W. Harrison filed a separate answer to said petition, a general denial. Defendant, Brunetta Harrison, filed separate answer as follows: “She denies each and every allegation and statement set forth in said petition and says that each and every one of them are untrue. And for further answer states that she is the legal owner in her own right of that portion of the real estate described in the plaintiff’s petition, to-wit: East half of southwest quarter and the west half of the southeast quarter and the northeast of the southeast quarter, all in section 13, township 45,

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range 24, and lots 7 and 8, in block 'M', of the railroad extension to the town of Knobnoster in Johnson county, Missouri; that the same was purchased for a valuable consideration from J. H. Warren; that the money paid to said J. H. Warren for said real estate was of her own property, held by her in her own right and for and on account of which the said J. H. Warren sold and in good faith conveyed to her the above-described real estate, and she is now in possession of the same and holding the same in her own right, wherefore defendant says that the plaintiffs have no just cause of action against this defendant and are not entitled to any judgment or decree affecting her interest in said real estate, and having answered prays that said bill as to her be dismissed with her costs."

The heirs of A. B. Harrison, by guardian *ad litem*, filed answer denying the allegations in the petition. But the court found to the contrary of said answers as already seen in the decree heretofore set forth.

David A. Glass then testified on behalf of plaintiff: "I am the same D. A. Glass who was mentioned in the suit with Brunetta Harrison *et al.* to set aside certain deeds. I entered into the agreement with Dr. Snell offered in evidence; at the time this suit was brought, Geo. W. Harrison was in possession of this land. The land is worth \$2.50 per acre, rent per annum. After Dr. Snell and I bought the land at sheriff's sale, we joined in a suit against Brunetta Harrison and others to set aside some deeds from Geo. W. Harrison on the ground of fraud. The case went to the supreme court. I claimed three-tenths of the land, and Dr. Snell claimed seven-tenths; that is the way we bought it at the sheriff's sale. I did not claim any other interest in the land."

Cross-examined: "I sold to Mrs. Harrison on the twentieth of April, 1881. Was in possession of about forty or fifty acres of the north eighty described in the petition. I claimed an interest of three-tenths in the

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land described in the petition. I took possession after the purchase at sheriff's sale and cultivated the land the next or the second year thereafter. I took a deed from Mrs. Ray the first or second year after purchasing at sheriff's sale."

Plaintiff, in his own behalf, testified as follows: "I am the plaintiff. I know the land in controversy. It could be rented for \$2.50 per acre per annum; it is worth that. Before the land was sold by the sheriff, D. A. Glass and I entered into the agreement to buy the lands and hold them in proportion to the amount of our judgments, and we did so buy the lands." This is all the evidence offered by the plaintiff in chief.

To maintain the issues on their part, the defendants offered in evidence the transcript of record and proceedings in the case of David A. Glass v. Geo. W. Harrison in the Johnson county circuit court commenced on the twenty-first day of January, 1875.

The petition in that cause was entitled: "Lucinda Ray and — Ray, her husband, and David A. Glass, an infant, who sues by James R. Glass, his guardian, and curator, plaintiff, against Geo. W. Harrison, defendant." The petition states in substance that plaintiff's father, Geo. W. Glass, died intestate, seized of the real estate therein described, to-wit: The northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter all in section 13, township 45, range 24; that he left as his only heirs at law Lucinda and David A. Glass, and his widow, Rebecca.

That defendant was a brother-in-law of said Geo. W. Glass; that defendant connived with the administrator of their father's estate and procured the allowance in the probate court of fictitious claims, and fraudulently procured the land to be sold by order of the probate court and obtained a deed to said land. The petition sets out in full the fraudulent acts of the defendant, and prays that the administrator's deed to

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defendant, Geo. W. Harrison, be set aside, and for judgment for possession of the premises and for rents and profits.

Afterward, at the June term, 1875, David A. Glass, by guardian and curator, filed an amended petition making Lucinda Ray and husband parties defendant with Geo. W. Harrison; he prays that the administrator's deed be set aside as to his interests and for possession thereof. (The administrator's deed sought to be set aside by this proceeding was dated April 4, 1870.) Defendant, Geo. W. Harrison, filed an answer denying specifically all the allegations in the petition. Lucinda Ray and husband did not file any answer.

At the February term, 1876, plaintiff filed a second amended petition, in two counts, the first to set aside the administrator's deed to Harrison, the second for possession and for rents and profits. With the second amended petition were filed as exhibits the administrator's deed, the application to the administrator to sell the real estate, the order of the probate court ordering the land sold, copy of the appraisement and report of sale with the order of the probate court approving the same. Defendant, G. W. Harrison, filed an answer to the amended petition denying specifically all the allegations therein contained. At the June term, 1876, the cause was tried.

The court found that defendant was guilty of all the fraudulent conduct charged against him in the petition and decreed as follows: "It is, therefore, ordered, adjudged and decreed by the court, that said allowance as well as said sale of said land as made by said public administrator together with said deed executed by said administrator to said defendant Harrison, be and they are hereby annulled and held for naught, so far as they affect the rights of David A. Glass, and that said defendant, G. W. Harrison, be divested of all rights and title which he may have acquired by virtue of said sale of said land and the deed therefor, and it having been

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shown to the court that said administrator has, in his hands, money arising from the sale of said land, which would properly belong to D. A. Glass if the sale had properly been made ; it is, therefore ordered that said administrator pay the same to said defendant, and it is further adjudged and decreed that the said defendant pay the costs and charges herein sustained, and that execution issue therefor."

To the introduction of the record and proceedings in the cause of D. A. Glass v. G. W. Harrison, above referred to. plaintiff objected, because the same was irrelevant, incompetent and immaterial ; because plaintiff was no party to said action, and because Glass and those claiming under him with knowledge were estopped from claiming any other interest than that acquired at the sheriff's sale ; which objections were overruled by the court, and plaintiff at the time excepted.

The defendants also offered in evidence the judgment obtained by David A. Glass in the ejectment count in his petition aforesaid, showing a recovery of \$300 for damages as well as rents and profits, it being one of the same judgments recited in the sheriff's deed heretofore mentioned. The return in this transcript also shows the acknowledgment of satisfaction of said judgment made on the margin of the record thereof, signed by David A. Glass, and dated April 20, 1881.

The plaintiff vainly urged objections to this transcript. The defendants next introduced in evidence over plaintiff's objections transcript of the record in an ejectment suit brought by plaintiff and David A. Glass against G. W. Harrison on the twenty-seventh of July, 1880, in which they recovered judgment for certain portions of the land in suit.

Over objections of plaintiff the defendants then introduced in evidence a copy of the administrator's deed to G. W. Harrison, executed April 4, 1870, and which the decree in favor of Glass set aside on account of Harrison's fraud, as already stated.

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Defendants next introduced a quitclaim deed from David A. Glass to Brunetta Harrison, dated April 19, 1881, conveying to her for the sum of \$100 the west half of the southeast quarter, the east half of the southwest quarter of section 13, township 45, range 24, etc., also warranty deed dated January 29, 1879, from Lucinda Ray and her husband to David A. Glass, consideration \$50,—conveying to him the undivided one-third in the land last aforesaid.

Defendants next introduced the following instrument: “This indenture made the sixth day of July, in the year one thousand, eight hundred and seventy-four (1874), between G. W. Harrison and Brunetta Harrison, of the county of Johnson, state of Missouri, parties of the first part, and Harvey Harrison, guardian and curator of the minor heirs of Charles Culver of the county of Johnson, state of Missouri, parties of the second part, witnesseth: That the said parties of the first part in consideration of the sum of four hundred dollars (\$400), to them duly paid, *has* bargained and sold, by these presents *does* grant and convey to the said party of the second part and his heirs and assigns forever all the right, title and interest to the following described real estate, viz.: The southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter in section number thirteen (13), township number forty-five (45), range number twenty-four (24), situated in the county of Johnson, state of Missouri. This grant is indorsed as security for the payment of a certain note herein described: ‘Knobnoster, Missouri, July 6, 1874. Twelve months after date I promise to pay to Harvey Harrison, guardian and curator, of the minor heirs of Charles Culver, deceased, four hundred dollars (\$400), for value received, with interest at the rate of ten per cent. per annum; which payment, if duly made, will render this conveyance void; and if default shall be made in the payment of the

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principal or interest above mentioned, then the said party of the second part or his executors, administrators or assigns are hereby authorized to sell the premises above granted, or so much thereof, as will be necessary to satisfy the amount then due, with the cost and expenses allowed by law.'

"In witness whereof, said parties of first part have hereunto set their hands and seals the day and year above written.

"(Signed) G. W. HARRISON [Seal].

"BRUNETTA HARRISON [Seal]."

Which instrument was acknowledged on the sixth day of July, 1874, and filed for record on the ninth day of July, 1874. Objections made by the plaintiff to this instrument were also overruled.

Defendants next introduced in evidence the following deed:

"Whereas Geo. W. Harrison and Brunetta Harrison, his wife, of the county of Johnson and state of Missouri, did by their mortgage deed, recorded in book J, page 208, on the sixth day of July, 1874, grant, bargain and convey to the undersigned Harvey Harrison as guardian and curator of the minor heirs of Charles Culver, deceased, the following described real estate situated in the aforesaid county of Johnson, to-wit: The southwest quarter of the southeast quarter and the southeast quarter of the southwest quarter of section 13, of township 45, and of range 24, for the purpose of securing the payment of a certain promissory note therein described; and whereas default has been made in the payment of the principal and interest of said note, now, therefore, I, the said Harvey Harrison, by virtue of the power and authority in me vested by said deed and in consideration of the sum of \$745 to me in hand paid by the said Brunetta Harrison, receipt whereof is hereby acknowledged, do by these presents grant, bargain and sell unto the said Brunetta Harrison the said real estate described as follows, to-wit: The

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southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter, both of section 13, of township 45, of range 24; to have and to hold the above-described real estate unto the said Brunetta Harrison, her heirs and assigns forever, with all the rights, privileges and appurtenances hereto belonging, that I might or could convey by virtue of the aforesaid mortgage deed, or by virtue of the aforesaid premises.

"In testimony whereof, I have hereunto set my hand and affixed my seal this the fourteenth day of January, A. D. 1882.

"[Seal.]

HARVEY HARRISON."

This instrument was duly acknowledged and filed for record on the eighteenth of August, 1882. This was also read over plaintiff's objection.

G. W. Harrison's discharge in bankruptcy dated May 26, 1885.

Defendant, G. W. Harrison, was then introduced as a witness for defendants and testified as follows: "I am one of the defendants; Brunetta Harrison is my wife. I am in possession of the land in right of my wife. The rental value of the land is from \$1.25 to \$2.50 per acre per annum. I borrowed the money from Harvey Harrison, secured by the mortgage on the south eighty. My wife [bought and] furnished the money to buy the land at the sale made by Harvey Harrison under his mortgage. [He had offered to sell to Snell the plaintiff, at the same price.] My wife, as tenant of Harvey Harrison, or the mortgagee, was in possession of the south eighty some two or three years prior to the date of the deed from him to her, read in evidence. She held possession [I presume] through me as her husband. The contract, however, was in writing between Harvey Harrison and my wife; he had taken possession before that as mortgagee. After the sale, she, through me, as her husband, held possession down to the present time. I consider I am in possession in

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right of my wife. I paid all rents on twenty-six and two-third acres of the north eighty down to February, 1886. Up to the time my wife purchased of D. A. Glass, April 20, 1881, I was only in possession of the south one-third of the north eighty. Glass had been in possession of the remainder of it since the setting aside of the administrator's deed to me as shown by decree read in evidence. This appeared in the evidence on the trial before Jackson as special judge in the ejectment suit brought by Snell and Glass against me, while their equity case was pending in the supreme court; and, in that case, for this reason they dismissed as to all but this one-third—I mean the south one-third—and recovered possession of this south one-third in that suit. I acted for my wife in the purchase of the interest of D. A. Glass in all this land represented by this deed to her of date April 20, 1881. She furnished her own separate money to buy it, proceeds of rent of her land held to her separate use. When I purchased, I understood from D. A. Glass that this conveyance represented not only the interest he held under contract with Snell, but also the interest which Ray and wife conveyed to him and his own interest in the north eighty which he got by setting aside the administrator's deed. The interest which my wife bought, or I as her agent thought she was buying, amounted to two-thirds of the north eighty acres."

Cross-examined: "The money paid to Glass for quitclaim deed was furnished by my wife. She got the money from proceeds of some land she owned near the Henry county line. I had nothing whatever to do with furnishing the money. The way the money was paid on the mortgage was by my wife giving her note, I signed the note with her. The note was recorded."

Defendants next read in evidence a warranty deed executed and acknowledged by Stephens and wife to Brunetta Harrison, on a certain eighty acres of land in section 27, township 45, range 24, in Johnson county,

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Missouri, for the expressed consideration of \$1,265, stated therein, to be paid to them by Brunetta Harrison. This deed conveyed the said property to the sole and separate use of said Brunetta and was executed and acknowledged on the eighth day of January, 1880, and recorded on the eighteenth day of March next thereafter. This deed as shown by the date of the decree already copied in the first part of this statement, was executed shortly before said decree was entered, and put to record shortly thereafter, and while this cause was pending on appeal in this court. Brackets have been placed around such portions of G. W. Harrison's testimony as do not occur in the *record*, and his cross-examination has also been added from that *record*, which was omitted from the abstract of defendants in error.

In rebuttal plaintiff offered in evidence certified copy of note from Brunetta Harrison and Geo. W. Harrison to Harvey Harrison, as follows: "Brunetta Harrison to Harvey Harrison, \$745.

"WARRENSBURG, Mo., January 14, 1882.

"Twelve months after date, we, or either of us promise to pay to Harvey Harrison or order, seven hundred and forty-five dollars (\$745), the purchase money for the southwest quarter of southeast, and the southeast quarter of the southwest quarter of section thirteen (13), township forty-five (45), range twenty-four (24), in Johnson county, state of Missouri, for value received, with interest from date at ten per cent. per annum.

BRUNETTA HARRISON,

"G. W. HARRISON."

The foregoing instrument was *filed for record* January 28, 1882.

The foregoing was substantially all the testimony offered in the cause.

The court then entered the following decree in the cause:

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"Now at this day come the said parties plaintiff and defendant by their respective attorneys, and the said defendant, Brunetta Harrison, by her attorney of record herein, Samuel P. Sparks, leave of the court being first had and obtained for that purpose, is allowed to by the court and does voluntarily dismiss from her amended answer herein, without any prejudice to her rights whatever, the following described interest or portion of the premises in controversy, to-wit: An undivided seven-tenths of the undivided one-third of the northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter, both of said tracts being in section 13, township 45, range 24, in Johnson county, Missouri, being the interest conveyed by deed of Joseph R. Ray and his wife, Lucinda A. Ray, to D. A. Glass of date January 29, 1879, recorded in the recorder's office in Johnson county, Missouri, in book 37, page 97.

"And the court, being fully advised touching the matters in controversy in this case, doth find from the pleadings and all the evidence in the case, that the defendant, Brunetta Harrison, and her codefendant, G. W. Harrison, are now, and were at the time of the institution of this suit, husband and wife; and that the said defendant, Brunetta Harrison, was at the time of the institution of this suit the legal owner of the following described portion or interest in the premises in controversy, to-wit: The whole of the southwest quarter of the southeast quarter, and the southeast quarter of the southwest quarter and sixteen-thirtieths of the northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter, all in section number 13, township 45, range 24, and that, at the time of the institution of this suit, the said defendant, G. W. Harrison, was in possession of said portion of said premises as the husband of said Brunetta Harrison, and claiming his right to such possession under said Brunetta Harrison solely; and that the said John R. Snell was at the

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time alleged in the petition, to-wit, June 1, 1880, and still is, entitled to the possession of the remaining fourteen-thirtieths of the said northwest quarter of the southeast quarter and the northeast quarter of the southwest quarter, and being so entitled to the possession, that the defendant, G. W. Harrison, afterwards, on the second day of June, 1880, entered into such possession and unlawfully withholds from plaintiff the possession thereof, to his damage in the sum of \$52; that the present monthly value of the rents and profits of said undivided fourteen-thirtieths of said northwest quarter of southeast quarter and northeast quarter of southwest quarter is the sum of \$6.50. Wherefore it is considered and adjudged by the court that the said plaintiff have and recover of said defendant, G. W. Harrison, the possession of the undivided fourteen-thirtieths of said northwest quarter of southeast quarter and northeast quarter of southwest quarter, of said section 13, township 45, range 24, Johnson county, Missouri, and the said sum of \$52 for his damages, and the sum of \$6.50 monthly rents and profits, and that he further recover of said defendant, G. W. Harrison, his costs herein expended and have execution therefor."

After an unsuccessful motion for a new trial, plaintiff brings up this cause on error.

I. As will have been observed from the foregoing statement, much of the evidence in this cause which was *dumped* upon the lower court, had no more of relevancy to the issues joined therein than the rings on Saturn.

It will be well, therefore, to shovel away the huge pile of *debris* which forensic contention has heaped on the foundations of this cause in order that we may know just where the lines of those foundations run. Here is a diagram of the *locus in quo*:

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N.			
	N. E.	N. W.	
	North		
	S. W.	S. E.	
	80		
	S. E.	South	
	S. W.	S. W.	
	80		
	S.		

For convenience we will hereafter refer to the land in dispute as the north eighty and the south eighty.

The chain of title to the latter eighty is the following:

First. Geo. W. Harrison owned it in 1874.

Second. Geo. W. Harrison and Brunetta to Harvey Harrison, mortgage, 1874.

Third. Geo. W. Harrison and wife to Alfred B. Harrison, warranty deed, 1875.

Fourth. Geo. W. Harrison, by sheriff, to Alfred B. Harrison, sheriff's deed, 1876.

Fifth. Geo. W. Harrison, by sheriff, to J. H. Warren, sheriff's deed, October 26, 1877.

Sixth. J. H. Warren and wife to Brunetta Harrison, quitclaim, January 24, 1878.

Seventh. Geo. W. Harrison, by sheriff, to Snell and Glass, sheriff's deed, February 15, 1878. July 16, 1878, suit was filed by Snell and Glass to set aside deeds above numbered 3, 4, 5 and 6, and on February 24, 1880, a decree was rendered in the Johnson county circuit

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court divesting Geo. W. Harrison, Brunetta Harrison and the heirs of Alfred B. Harrison and J. H. Warren of all title to said land and vesting the same in Snell and Glass.

Eighth. David A. Glass to Brunetta Harrison, quitclaim, April 19, 1881. Harvey Harrison to Brunetta Harrison, January 14, 1882.

The decree of February 24, 1880, swept out of existence all the right, title and interest which Geo. W. Harrison had in the land in controversy, as well as all that his wife Brunetta had, by and through the covinous contrivances, fraudulent execution sales, sheriff's deeds and individual deeds in that decree set forth. The only thing which could arrest the searching and sweeping force of that decree, as to a portion of the land, was the mortgage executed by G. W. Harrison and his wife July 6, 1874, whereby the south eighty was conveyed to Harvey Harrison. But these remarks only apply to the *legal* title of G. W. Harrison, and not to any *equity* of his which might pass in consequence of the execution sales in favor of Snell and in favor of Glass and by reason also of the decree of February 24, 1880, in their favor. Under which proceedings plaintiff would be entitled to seven-tenths of the *equitable* title of G. W. Harrison in said south eighty.

This statement is, however, made upon the theory that the mortgage executed by G. W. Harrison and wife to Harvey Harrison, conveying to the latter the south eighty, was a *bona fide* instrument and not a *mere sham*, intended to assist G. W. Harrison in concealing his property from his creditors.

That G. W. Harrison and Brunetta, his wife, had no scruples in that direction and were familiar with such covinous contrivances and were well disposed toward the same is conspicuously and abundantly shown by the chain of title already set forth and by the decree of February 24, 1880, which overthrew and brought to naught all those fraudulent transactions. But note

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other matters: The mortgage in question on the south eighty was executed on the sixth day of July, 1874, and the note thereon secured was made by G. W. Harrison and made payable twelve months after date with interest at ten per cent. per annum, was signed not only by G. W. Harrison but by his wife, Brunetta, who at that time does not appear to have been even the apparent owner of any property whatever. At that time, also, G. W. Harrison's note to Snell had been due since March 30, 1874, and he was otherwise in embarrassed circumstances.

On October 9, 1875, this same south eighty (as well as the north eighty, also) had been conveyed by G. W. Harrison and wife to A. B. Harrison for an expressed consideration of \$2,000, which conveyance, the decree of February 24, aforesaid, found to be fraudulent and void. In addition to the foregoing facts, the sale and deed made by Harvey Harrison to Brunetta Harrison on the fourteenth day of January, 1882, though the deed was not acknowledged and recorded till August 18, 1882, are remarkable in several particulars: As to the manner of executing the extraordinary power of sale alleged to have been conferred by the mortgage of 1874; as to the consideration for which sale and deed were made, and as to the fact that *they were made at all*.

Taking the alleged original debt, \$400, and calculating the interest thereon at ten per cent. up to the date of said deed; it will be found that that sum put at single interest for, say, seven and one-half years will amount to about the sum for which the second note was given, \$745. But if the note for \$400 was a *real and valid debt* what was the reason Harvey Harrison, the curator of the minor heirs of Culver, did not pursue the usual course of business and of duty by annually collecting the interest due on that note for the benefit of his wards?

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But what is more singular still: What *honest* object could a mortgagee, especially a *curator of minor heirs*, have in exchanging a note well secured by mortgage for one unsecured, and then *releasing that mortgage* by executing to the maker of the new note, a *married woman* at that, an *absolute deed* to the recently mortgaged property? No explanation of Harvey Harrison's unusual course and strange dereliction of duty in this regard is attempted. But one of two rational conclusions can be drawn from it, either that he was false to his wards, or else false to the duties as a citizen in assisting G. W. Harrison in concealing his property from his creditors.

But notice further: It is claimed that the mortgage under the terms of the statute, section 3310, Revised Statutes, 1879, conferred the power on Harvey Harrison without notice, publication or warning, bids, counter-bids or competition to sell the mortgaged premises at such time and place and for cash or on credit, as his own sweet will might determine, and thus foreclose G. W. Harrison's equity of redemption.

No case has been found where the point has been directly adjudicated. In *Davey v. Durrant*, 1 De G. & J. 535, the power given authorized a sale, either public or by private contract. In *Mowry v. Sanborn*, 68 N. Y. 153, and in *Martin v. Paxson*, 66 Mo., *loc. cit.* 266, the utterances were wholly *obiter*. But it has been determined that, "if the mortgagee omits to give proper notice, *whether directed by the power or not*, the sale may be impeached in chancery." 4 Kent [13 Ed.] 190.

Our statute to which reference has been made is the following (R. S. 1879, sec. 3310): "All mortgages of real or personal property, or both, with powers of sale in the mortgagee, and all sales made by such mortgagee or his personal representative, in pursuance of the provisions of such mortgages, shall be valid and binding, by the laws of this state, upon the mortgagors, and all persons claiming under them, and shall forever foreclose

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all right and equity of redemption of the property so sold."

But in the mortgage in question there are no "provisions" "in pursuance" of which a sale was to occur. The statute, therefore, would seem not to sanction the view of it for which the defendants contend. Taking their theory, however, of the statute as correct, this only enhances the extraordinary power which the mortgage of 1874 gave to the mortgagee.

Contrasted with such a summary instrument as that, the ordinary "cut-throat" mortgage, as it is colloquially termed, might well "hide its diminished head." But the sale under the mortgage, if valid, cut out all subsequent purchasers, etc., and related to the date when that mortgage was given. 2 Jones, Mort., sec. 1654. This may, perhaps, furnish one of the reasons why the mortgage was drawn as it was, and why the sale thereunder occurred in the manner it did.

But notice further: This cause was heard in December, 1886, about four years after the sale under the mortgage happened, and there was no testimony that the note for \$745, which fell due in twelve months, had ever been paid, or that any interest thereon had ever been paid. Furthermore, the note itself on the twenty-eighth day of January, 1882, was recorded, though the deed for the land for which the note was given was not acknowledged and recorded till August 18, 1882. Why this should have been done is certainly strange and out of the customary course. Does the curator still let that unsecured note run at interest as he did the one which was secured?

Now, if the transactions aforesaid were fraudulent as to the creditors, then they were void under the statute and no title passed by reason of them; but, whenever a question of fraud is involved in the issues, then any unusual clause in an instrument, any unusual method of transacting the business, apparently done to give the transaction an air of honesty and good faith, is of itself

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a badge of fraud; for, "when the part is overacted, the delusion is broken and the fiction appears." *Comstock v. Rayford*, 12 S. & M. 369; *Baldwin v. Whitcomb*, 71 Mo. 651; *Houts v. Shepherd*, 79 Mo., *loc. cit.* 147; *Hoge v. Hubb*, 94 Mo. 503; Bump on Fraud Convey. 500.

Taking all the foregoing circumstances into consideration, the antecedent fraudulent purpose of G. W. Harrison, and his proclivity to defraud his creditors, manifested in such a variety of ways and for such a number of years, and the recorded participation of his wife Brunetta, therein, with regard to this same land; the extraordinary character of the mortgage deed and the remarkable sale and deed made thereunder, as well as the releasing of the mortgage, and the singular pains taken to record the note after the incumbrance which secured it in its original state was *canceled*; the conclusion has been reached that nothing in that mortgage or any of the subsequent proceedings thereunder offer any barrier to the successful prosecution of the plaintiff's action, and that, therefore, he is entitled to recover the undivided seven-tenths of the south eighty—twenty-one-thirtieths thereof, and that Brunetta Harrison is entitled to three-tenths of the same, nine-thirtieths thereof.

II. Next for discussion are the facts and circumstances relating to the north eighty, the chain of title to which is as follows:

First. George W. Glass died seized thereof, leaving Rebecca, his widow, who elected to take child's part, leaving one son, David A. Glass, and one daughter, Lucinda.

Second. Rebecca Glass, widow to Geo. W. Harrison, warranty deed, one-third, January 11, 1867.

Third. Geo. W. Glass by administrator to Geo. W. Harrison, A. D., April 4, 1870.

Fourth. Geo. W. Harrison to A. B. Harrison, warranty deed, October 9, 1875.

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Fifth. Geo. W. Harrison by sheriff to A. B. Harrison, sheriff's deed, October 17, 1876.

Sixth. Geo. W. Harrison by sheriff to J. H. Warren, sheriff's deed, October 26, 1877.

Seventh. J. H. Warren to Brunetta Harrison, quitclaim, January 24, 1878.

Eighth. Geo. W. Harrison by sheriff to J. R. Snell and David A. Glass, sheriff's deed, February 15, 1878. July 16, 1878, suit was brought by Snell and Glass to set aside deeds above, numbered 4, 5, 6 and 7, and on February 24, 1880, decree was rendered setting aside said deeds, divesting the title of the grantees and Geo. W. Harrison to said land and vesting the title thereof in Snell and Glass.

Ninth. Lucinda Ray, *nee* Glass, and husband to David A. Glass, warranty deed, one-third, January 29, 1879.

Tenth. David A. Glass to Brunetta Harrison, quitclaim, April 19, 1881.

As already disclosed by the record, David A. Glass was entitled by reason of heirship to the undivided one-third of the eighty in question, and his sister Lucinda, to a like proportion of that tract; but G. W. Harrison, by his fraudulent conduct through administration proceedings, obtained the title of the two heirs, which title so far as concerned David A. Glass was set aside on his part by proceedings in equity. This resulted simply in his being restored to that which he had lost, and he was not estopped from claiming that interest by his agreement with Snell already set forth, nor from afterwards purchasing from his sister Lucinda her undivided one-third interest in said eighty. In all probability without any agreement to that effect the law would have divided and apportioned the legal and equitable title and interest of Snell and Glass in accordance with, and in proportion to, the respective amounts of purchase money paid, just as was done by the agreement and by the sheriff's deed; but be that as it may, the sheriff's

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deed at any rate fixed the status and proportion of their respective interests.

The evident object and meaning of that agreement was to establish, then and there, just *what* proportion of interest each of the parties acquired as a result of the sheriff's sale and deed, and not to restrict either party from afterwards purchasing whatever further interest in the land they desired to do. Nor was Glass debarred from taking the entire independent interest which he should thus purchase for his own individual benefit. Of course, being a tenant in common with Snell, by reason of their joint purchase, he could not buy in an adverse or outstanding paramount title, so as to oust his cotenant; for such purchase would in equity inure to the benefit of the other tenant in common (*Picot v. Page*, 26 Mo. 398; *Dillinger v. Kelley*, 84 Mo. 561); but this rule would be inapplicable when one tenant in common buys in the independent interest of another tenant in common—similarly situated as himself.

The effect, then, of the purchase of Glass from his sister Lucinda Ray was the acquisition of the undivided one-third of the north eighty. But this was only her equitable title thereto. Such transfer, however, of the property carries with it as an incident the right and equity to set aside the administrator's deed to Harrison on account of the fraud he had practiced in procuring it. *Traer v. Clews*, 115 U. S. 528; *McMahon v. Allen*, 35 N. Y. 403; *Smith v. Harris*, 43 Mo. 557.

And the possession of such an equitable title was a sufficient defense to plaintiff's action so far as the interest of Lucinda extended. As the result of the above facts, Brunetta Harrison through the deed from David A. Glass acquired title to the undivided two-thirds of the north eighty as well as the undivided three-tenths of the undivided one-third of that eighty, making two-thirds plus three-tenths of one-third equal to twenty-three-thirtieths of that tract. Snell by his sheriff's deed

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only acquired seven-tenths of the undivided one-third of that tract, equal to seven-thirtieths.

III. The counsel for Brunetta Harrison was permitted to strike from her answer her claim to a certain portion of the north eighty, as recited in the decree. While it is true that under our practice a *plaintiff* may take a *nonsuit*, certainly a *defendant* cannot do so and thus keep back a portion of the matter in litigation from adjudication.

IV. It has been deemed unnecessary to enter on any discussion of whether the purchase by Brunetta Harrison of the interest of David A. Glass in the north eighty was made with her own means or not, since whether or not this was the case cannot affect the interests of plaintiff, whose execution spent its force at the sale in February, 1878, and, of course, could not extend to after-acquired property.

Relative to the bill of exceptions not having thereto affixed the seal of the judge, it suffices to say that the statute, section 3635, Revised Statutes, 1879, requires that the bill should be signed by the judge, but not that he should *seal* it. Besides, the defendants having joined in error, it is quite too late to raise such an objection. *Baile v. Ins. Co.*, 73 Mo., *loc cit.* 388.

The judgment will be reversed and the cause remanded with directions to the lower court to enter judgment as heretofore indicated after taking an account as to the rents and profits. All concur. BARCLAY, J., as to all the legal propositions except as to the remark on the effect of the joinder in error.

 Tracy v. The Union Iron Works.

 TRACY V. THE UNION IRON WORKS COMPANY, *Appel-*
lant.

DIVISION ONE.

Written Contract not Varied by Oral Agreement. The terms of a valid written instrument cannot, as a rule, be varied or contradicted by evidence of contemporaneous or prior oral agreements.

Certified from Kansas City Court of Appeals..

AFFIRMED.

The lease mentioned in the opinion of the court is in these words, viz. :

"This article of agreement witnesseth: That H. W. Tracy has this day rented to the Union Iron Works Company, of Decatur, Illinois, in the present condition thereof, the upper story of his business house, known as 1305, 1307 and 1309 West Twelfth street, Kansas City, Missouri, said company to have the use of elevator and platform in common with the other tenants of building, and to pay their fair proportion of water rates for same, and other uses about the house; also office desk room and space for sample machine on first floor for the period of one year from the first day of May, 1884, on the following terms and conditions, to-wit:

"For the use and rent thereof, the said Iron Works Company hereby promises to pay said H. W. Tracy, or to his order, \$1,000 per year for the whole time above stated, and to pay the same monthly on the first of each month; that they will not sublet or allow any other tenant to come in with or under them without the

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consent of the said H. W. Tracy; that they will repair all injuries or damages done to the premises during their occupancy, or pay for the same; that all of their property, whether subject to legal exemption or not, shall be bound and subject to the payment of the rents and damages thereof; that they will take good care of the building and premises, and keep them free from filth, from danger of fire or any nuisance, and protect and defend the said H. W. Tracy from all charges for such; that the house and premises shall be fairly treated, kept clean and left so; that, in default of the payment of any monthly installment of rent for ten days after the same is due, they will, at the request of the said H. W. Tracy, quit and render to him the peaceable possession thereof, but for this cause the obligation to pay shall not cease; and finally, at the end of their term, they will surrender to the said H. W. Tracy, his heirs or assigns the peaceful possession of the said house and premises, with all the keys, bolts, latches and repairs, if any, in as good condition as they received the same, the usual wear and use and providential destruction excepted. In case of any accident that may occur to elevator, the party at fault for same shall pay for all costs of repairing made necessary by such accident.

“In witness whereof the parties have subscribed to two copies hereof, one to be retained by each of the above-named parties.

“Dated this twenty-fifth day of April, 1884.

“(Signed) H. W. TRACY, [Seal.]

“UNION IRON WORKS, [Seal.]

“A. R. MONTGOMERY, Sec'y, [Seal.]”

The other facts necessary to an understanding of the case appear in the opinion.

Albert Young and W. A. Alderson for appellant.

(1) Though all anterior and contemporaneous stipulations and agreements are presumed to be merged in

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a contract when reduced to writing, yet this rule does not exclude fraudulent misrepresentations made for the purpose of inducing a party to execute a contract, and as to matters and conditions precedent which go to the consideration of the signing of such instrument. Also a verbal agreement which is collateral to a lease of writing and a part of the consideration may be shown in evidence. 2 Wharton's Law of Evidence, sec. 1019; Stephen's Digest of Evidence, 104; Bigelow on Fraud, 487; *Gooch v. Connor*, 8 Mo. 391; *Liebke v. Methudy*, 14 Mo. App. 65; *Laudman v. Ingram*, 49 Mo. 212; *Murray v. Dake*, 46 Cal. 644; *Isenhoot v. Chamberlain*, 59 Cal. 630; *Prentiss v. Russ*, 16 Me. 30; *Boyce v. Grundy*, 3 Peters, 210-219; *Thomas v. Beebe*, 25 N. Y. 244; *Renshaw v. Gans*, 7 Barr. 117; *Taylor v. Gilman*, 25 Vt. 412; *Cogers v. McGee*, 2 Bibb (Ky.) 321; *Chapin v. Dobsons*, 78 N. Y. 74; *Cozzin v. Whitaker*, 3 S. & P. (Ala.) 322; *Erskine v. Adeane*, 8 L. R. Ch. App. 756; *Angell v. Duke*, 10 Q. B. 174; *Morgan v. Griffith*, L. R. 9 Ex. 70; *Brown v. Bowen*, 90 Mo. 184; *Jeffrey v. Walton*, 1 Starkie, 213; 6 Cush. 557; 36 Me. 413; 39 Me. 271; 46 Me. 144; 3 Starkie on Ev., p. 1049; *Lewis v. Seaburg*, 74 N. Y. 409; *Juillard v. Chaffee*, 92 N. Y. 529; *Green v. Randall*, 51 Vt. 67; Stephens on Evidence, chap. 12, art. 90. (2) Whenever there are facts in dispute, or there are inferences to be drawn from facts proven, though the evidence is very slight, yet if there is some evidence the plaintiff has a right to have it submitted to the jury. Very slight circumstances, when combined, may establish deceit and fraud. The proof need not be direct or positive, but may be gathered from all the circumstances. It is the province of the jury alone to determine this. *Buesching v. Gaslight Co.*, 73 Mo. 219; *Kelley v. Railroad*, 70 Mo. 604; *Blewett v. Railroad*, 72 Mo. 583; *Walsh v. Morse*, 80 Mo. 568; *Jackson v. Hardin*, 83 Mo. 175-86; *Dulaney v. Rogers*, 64 Mo. 201; *Brown v. Railroad*, 50 Mo. 461; *Kearne v. Keathe*, 63 Mo. 84; *Massey v. Young*, 73

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Mo. 273; *Bank v. York*, 89 Mo. 369; *Gooch v. Connor*, 8 Mo. 285; *Liebke v. Methudy*, 14 Mo. App. 65.

Warner, Dean & Hagerman for respondent.

This case comes here through the court of appeals. The decision there was in our favor. 29 Mo. App. 342. It reaches here by reason of the opinion of Judge PHILIPS that the opinion of the majority delivered by Judge HALL was in conflict with *Brown v. Bowen*, 90 Mo. 184. We are content to place the majority opinion against the minority. Since the decision of the case by the court of appeals this court has affirmed *Pearson v. Carson*, 69 Mo. 550, and settled the doctrine in harmony with Judge HALL's opinion. See *Slate ex rel. Norman v. Hoshaw*, 98 Mo. 358, where this court refuses to follow Pennsylvania cases relied on by Judge PHILIPS. *Gray v. Gaff*, 8 Mo. App. 329; *Wilson v. Dean*, 74 N. Y. 531; *Miller v. Dunlap*, 22 Mo. App. 97; *Walker v. Engler*, 30 Mo. 130; *Higgins v. Cartwright*, 25 Mo. App. 610; *Smith v. Thomas*, 29 Mo. 307; *Jones v. Shaw*, 67 Mo. 667; *Rodney v. Wilson*, 67 Mo. 123; *Helmrick v. Gehrke*, 56 Mo. 79; *Chrisman v. Hodges*, 75 Mo. 413; 1 Greenl. on Ev. 275; *Bart v. Bank*, 101 U. S. 93; 2 Kent's Com. [13 Ed.] side p. 356; 2 Phillips on Ev. [4 Am. Ed.] p. 665.

BARCLAY, J.—Plaintiff brought this action to recover certain instalments of rent, due from defendant according to the covenants of a lease dated April 24, 1884, under the seals of both parties, whereby plaintiff let certain business property in Kansas City, Missouri, to defendant for one year from May 1, 1884, on terms, one of which was the payment of \$1,000 rent during that period. Defendant went into possession and concedes non-payment of the rent in dispute. The reason therefor appears in the counterclaim interposed. That part of defendant's answer and the evidence supporting it raise the only question presented on this appeal.

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Defendant's position is that the rent due is subject to reduction to the extent of damages sustained by defendant by the breach of a verbal agreement between plaintiff and defendant, the admissibility of which in evidence is the point in dispute.

The trial court heard defendant's testimony on the subject fully (over objections), and then directed a verdict for plaintiff, a stipulation having been made at the outset of the trial, that plaintiff was entitled to recover the amount claimed unless the defense in question was established.

The facts shown on defendant's part were that it was engaged in the manufacture and sale of cornshellers and other farm machinery at Decatur, Illinois. It rented the premises at Kansas City as a storehouse and business office. When the negotiations for the lease began, it was verbally agreed, between plaintiff and defendant's representative, that the former would put in a railway switch (to connect the premises with a railroad near by) for the use of defendant for shipping purposes. Something was then said about inserting this stipulation in the lease, but plaintiff declared it was not necessary as the thing would be done by the time defendant would be ready to use the track after moving in, adding that his word was as good as his bond. Shortly afterwards the lease was prepared in Kansas City, and forwarded to Decatur for signature on the part of defendant. On examining its terms, the defendant made an amendment by inserting the words, "also office desk room and space for sample machine on first floor" (as they now appear). Then the instrument was formally executed by both parties. It contains no such express agreement as defendant now insists upon, concerning a railway switch.

It will be assumed that defendant's proof showed substantial damages in consequence of the want of the railway connection mentioned.

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On this showing the trial court directed a verdict for plaintiff. In due course defendant appealed to the Kansas City court of appeals where the judgment was affirmed. The cause, however, was certified to the supreme court as directed by the constitution, in view of a division of opinion among the judges of the court of appeals. *Tracy v. Iron Works* (1888), 29 Mo. App. 342.

It should be noted that the verbal agreement asserted by defendant was made in the preliminary negotiations leading to the written lease, and that the latter purports to be complete in itself. It defines with particularity the property whose use was let to defendant. Part of it consisted of privileges in the nature of easements (for example, the use of the elevator and platform in common with other tenants), appurtenant to that part of the property of which defendant was to enjoy exclusive occupancy. The principal subject-matter of the letting was the upper story of the building, numbered 1305, 1307 and 1309, West Twelfth street, in Kansas City, Missouri, "in the present condition thereof." The terms, reserving rent, are clearly expressed and many customary stipulations in regard to repairs, underletting and care of the premises, appear.

Defendant contends that plaintiff's prior agreement to add a railroad switch to the demised premises should be regarded as collateral to the lease, and admissible as such. It is not denied that verbal evidence in contradiction of written, and especially of sealed, documents is usually inadmissible; but the case here is said to belong to a recognized class of exceptions to that rule. Waiving all question that might arise from the form of the lease as a specialty and treating it merely as a written contract, let us examine the merits of defendant's contention.

The general rule excluding evidence of contemporaneous, or prior verbal agreements, varying or

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contradicting the terms of a valid written instrument, is the outgrowth of the common experience of men. It is of great antiquity and appears in other systems of jurisprudence besides our own. Corp. Jur. Civ., Cod. Lib. 4, Tit. 20; Tait's Evid., pp. 326, 327.

It rests on principles somewhat analogous to those which underlie the doctrine of the conclusiveness of judgments upon parties thereto. It is said to be the interest of the state that there should be an end to litigation. Accordingly, the record that closes a forensic controversy is regarded as merging the matters litigated to the extent declared in the judgment. So, in private adjustments of reciprocal rights, it is wisely considered that, when parties have deliberately put their mutual agreements into the form of a completed written contract, that expression of their intention should be accepted as a finality, in which is merged all prior negotiations within the scope of the writing.

But the rule has too long occupied a place as a corner-stone in the law of evidence to require, at this day, any justification of its existence.

We may, however, properly remark that the adoption of the modern practice, admitting as witnesses the parties directly interested in the action, seems to add a cogent reason to those existing at the common law, for a close adherence to the rule under discussion. If the uncertainty of "slippery memory" furnished a ground for excluding such verbal testimony in the days of Lord COKE (*Countess of Rutland v. Earl of Rutland* (1604), Coke's Reports, Part 5, 28a), how much stronger reason for such exclusion to-day when the influence of self-interest is so likely to render the memory of litigating parties more "slippery" than was that of the witnesses of olden time.

In Missouri the general rule has been repeatedly approved in early, as well as recent, decisions. *Woodward v. McGaugh* (1843), 8 Mo. 161; *Walker v. Engler* (1860), 30 Mo. 130; *State ex rel. v. Hoshaw* (1889), 98

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Mo. 358; *Morgan v. Porter* (1891), 103 Mo. 135; 15 S. W. Rep. 289.

There are, however, cases, here and elsewhere, announcing propositions called exceptions to this rule. Some may fairly be so described, as, for example, those admitting parol evidence to contradict a recited consideration, or to show that, in equity, an absolute deed was intended as a mortgage. But it will be found, we think, that many rulings, on this topic, which, at first sight, appear exceptional, are rather instances not embraced within the true meaning and scope of the rule. As such may be mentioned cases in which fraud, mistake or illegality has prevented the written instrument from acquiring original vitality as a contract, or those admitting evidence to identify its subject-matter, as well as others in which the writing, on its face, appears to be an incomplete, or merely one-sided expression of the terms of agreement. *Rollins v. Claybrook* (1856), 22 Mo. 405; *Moss v. Green* (1867), 41 Mo. 389.

The pending appeal does not demand any attempt to classify the so-called exceptional cases., Especially do we abstain from any effort to indicate what kind of verbal agreements may be shown, collateral to a written one, beyond the requirements of the appeal now actually in hand.

The facts in the present record disclose that the verbal agreement, proposed to be shown, contemplated a substantial addition by the plaintiff to the property which was the subject of the demise, whereas the terms of the written lease between the parties declared that the premises were let "in the present condition thereof."

Obviously the oral testimony in question contradicted the very language of the writing in which these business men, dealing at arm's length, had deliberately expressed themselves. We think the learned circuit judge correctly held such testimony inadmissible and that it could find no proper place in the case made by the pleadings, without departing from sound principle

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and precedents. *Brigham v. Rogers* (1822), 17 Mass. 571; *Cleves v. Willoughby* (1845), 7 Hill (N. Y.) 83; *Howard v. Thomas* (1861), 12 Ohio St. 201; *Nqumberg v. Young* (1882), 44 N. J. L. 331; *Diven v. Johnson* (1888), 117 Ind. 512; *Stoddard v. Nelson* (1889), 17 Oregon, 417; *McLean v. Nichol* (1890), 43 Minn. 169; *Gordon v. Niemann* (1890), 23 N. E. Rep. (N. Y.) 454.

We do not deem it necessary to review all the decisions pointing to this conclusion. On the other hand the precedents cited by defendant, as illustrative of collateral verbal agreements that have been upheld, we apprehend are inapplicable to the facts of the case now in judgment.

The decision in *Brown v. Bowen* (1886), 90 Mo. 184 (in view of which this cause was certified here), is not to be considered, and was not intended to conflict with any of the rulings announced herein.

We regard the action of the trial court as correct and accordingly affirm the judgment of the Kansas City court of appeals, which was to the same effect. SHERWOOD, C. J., BLACK and BRACE, JJ., concur.

SNEATHEN *et al.* v. SNEATHEN *et al.*, *Plaintiffs in Error.*

DIVISION ONE.

1. **Marriage, Sufficient Evidence of.** The evidence in this case is deemed sufficient to establish a legal marriage.
2. **Conveyance: UNDUE INFLUENCE.** The charge that a conveyance of land was obtained by the fraud, compulsion and undue influence of the wife of the grantor *held* not to be proved.
3. **Equity: LAND: CLOUD ON TITLE.** A court of equity will entertain a bill to remove a cloud on title to land in behalf of persons not in possession, if they have no adequate remedy at law.
4. ———: ———: ———. The jurisdiction in equity to remove a cloud on title is not only remedial but preventive.

104	201
106	440

104	201
113	174
117	472
54a	92

104	201
120	624

104	201
125	561

104	201
133	96

104	201
141	662

104	201
150	311
151	696

104	201
150	652

104	201
166	367

104	201
98a	7181

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5. **Deed, Delivery of: LIFE OF GRANTOR.** The delivery of a deed is an essential element of a valid transfer of title to real estate and it must take place during the life of the grantor ; for a deed cannot be made to perform the functions of a will.
6. **Deed : DELIVERY TO THIRD PERSON.** The delivery, however, need not be made to the grantee in person.
7. — : —. A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor is dead at the date of the last delivery ; for the delivery takes effect by relation as of the date when first made to the third person.
8. — : —. It should appear in the foregoing case that the grantor parted with all dominion and control over the instrument, intending it to take effect and pass title as a present transfer, and this intention may be indicated by acts or words, or by both.
9. — : —. The rule that the grantor must part with all dominion and control over the deed does not mean that he must put it out of his physical power to procure repossession of it.
10. — : WIFE OF GRANTOR. The wife of the grantor may be the third person to whom the grantor can deliver a deed for the grantee.
11. — : ACCEPTANCE: INFANT GRANTEEES: PRESUMPTION OF. When the grantees are infants the law presumes assent on their part to a beneficial conveyance, and knowledge of the same and its delivery are not essential.

Appeal from DeKalb Circuit Court.—HON. JOS. P. GRUBB, Judge.

REVERSED.

Samuel G. Loring for plaintiffs in error.

(1) The plaintiffs nowhere allege, directly or by implication, that they or either of them were in the possession of the lands in controversy, and there is nothing, if the allegations of the petition are true, to prevent them from successfully prosecuting their suit by ejectment. *Graves v. Ewari*, 99 Mo. 13 ; *Davis v. Sloan*, 95 Mo. 552 ; *Dyer v. Bannock*, 66 Mo. 216 ; *Clark v. Ins. Co.*, 52 Mo. 270 ; *Gage v. Griffin*, 103 Ill. 41 ; *Gage v.*

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Abbott, 99 Ill. 366 ; *Harden v. Jones*, 86 Ill. 313. (2) The petition itself admitted the delivery of the deed and the only issue presented was that of its procurement by "fraud, threats and undue influence." (3) The court erred in finding the issues in the case for the plaintiffs. There were no relations of confidence or trust in the case, and by the pleadings the issue was upon the plaintiffs to prove either that William Sneathen had not at the time of the execution of said deed the mental capacity to make it, or that said deed was obtained by the use of fraud, threats or undue influence upon the part of Mrs. Sneathen or some one else. *McKinney v. Hensley*, 74 Mo. 331 ; *Wood v. Broadley*, 76 Mo. 32 ; *Brinkman v. Rueggessick*, 71 Mo. 556. (4) The fact (if proven) that Mrs. Sneathen had an influence over the mind of her husband, growing out of their marital relations, is no objection to the validity of said deed unless that influence was used to procure it. *Rankin v. Rankin*, 61 Mo. 300 ; *Jackson v. Hardin*, 83 Mo. 185. And must be shown to exist at the time of its execution. *Tingley v. Cowgill*, 48 Mo. 291. The influence denounced by law must be such as amounts to over-persuasion, coercion or force, destroying at the time of the execution of said deed the free agency and will power of the grantor, William Sneathen. *Jackson v. Hardin*, 83 Mo. 185. (5) Though a delivery of a deed is essential to its validity, yet that delivery may be either an actual or a verbal one. It is sufficient if there is an intention or assent of the mind of the grantor to treat the instrument as a deed and clothe it with all the attributes of a legal instrument. *Farrah v. Bridges*, 5 Humph. 411 ; *Miller v. Tullman*, 81 Mo. 316 ; *Huey v. Huey*, 65 Mo. 690 ; *Cook v. Brown*, 34 N. H. 460 ; *Standiford v. Standiford*, 97 Mo. 233 ; 1 Greenl. Ev., sec. 297. (6) A deed in the possession of the grantee is presumed to have been delivered, possession being *prima facie* evidence of delivery. *Greer v. Tarnal*, 6 Mo. 326 ; 13 Cent. Law Jour. 224 ; *Reed v. Douthitt*,

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62 Ill. 350; *Tunison v. Chamblen*, 88 Ill. 378; *Boodey v. Daves*, 20 N. H. 140. (7) The deed constituted a voluntary settlement of the grantor's property preparatory to his death. *Boughton v. Boughton*, 1 Atk. 625; *Sanverbye v. Arden*, 1 Johns. Ch. 240; *Johnson v. Smith*, 1 Ves. 314; *Jones v. Jones*, 6 Conn. 111; *Newton v. Bealer*, 41 Iowa, 339; *Masterson v. Cheek*, 23 Ill. 76. (8) Under the allegations of the petition, Perdilla Sneathen, even if never married to William Sneathen, had no right to the possession of said lands after the death of William Sneathen. *Graves v. Ewart*, 99 Mo. 13.

Stephen S. Brown for defendants in error.

(1) The homestead or life interest of Perdilla Sneathen having been reserved to her in the deed to the Andersons, and she being entitled to the possession of the property during her lifetime, the plaintiffs had no remedy at law to test the validity of the deed. 1 Story's Eq. Jur. [12 Ed.] sec. 700 and note 4; 3 Pomeroey's Equity, secs. 1333, 1399, and note 4. (2) The deed in question purports to be the act of Sneathen and wife on the one side and the Anderson boys on the other. The fact that it only conveys an estate in remainder can in no way affect its character as a contract between the grantors and the grantee, which must be executed by signing, sealing and delivering it. At any time during this process the grantor is at liberty to change his mind. The instant the deed is delivered, the title which it purports to convey passes from the grantor. The question in all these cases is, would the title remain in the grantor should he destroy the deed with the intent that it should so remain? (3) It is necessary to the validity of the deed that there should have been a delivery in the lifetime of the grantor. *Huey v. Huey*, 65 Mo. 689; *Hammerslough v. Cheatham*, 84 Mo. 13; *Turner v. Carpenter*, 84 Mo. 333.

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BLACK, J.—William Sneathen died on April 25, 1881. Prior thereto and on March 24, 1881, he and his wife, Perdilla, executed a deed purporting to convey the home place, consisting of one hundred and twenty acres of land, to Malcom Anderson, Emory Anderson and William Anderson, who are the grandchildren of William Sneathen, by his first marriage, the grantors reserving in the deed a life-estate to themselves. The plaintiffs in this case are also children and grandchildren of William Sneathen by his first marriage, and by this suit they seek to set aside that deed.

The substantial averments of the petition are: That, though Perdilla was the lawful wife of one Moore, yet she and William Sneathen lived and cohabitated together from 1860 to his death; that she by the use of fraud and threats and undue influence persuaded and compelled him to make the deed; that he failed to deliver the deed during his lifetime, and after his death she procured and delivered the same to the grantees therein named.

1. The evidence shows that William and Perdilla were married in 1860. She then supposed her former husband was dead, but, hearing that he was still living, she commenced proceedings for divorce, pending which she received reliable information that he was dead.

The divorce proceedings were then dismissed, and she and Sneathen were again married. With this evidence, and it is all there is upon the subject, it must be held that she was the lawful wife of Sneathen for many years prior to his death.

2. The evidence bearing upon the question of fraud, compulsion and undue influence shows that this and other deeds made by the deceased at the same time cut off plaintiffs from any portion of their father's real estate. He was seventy-eight years old when the deeds were made. While age had brought about physical infirmities and to some extent weakened his mental

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capacity, still he rode about his farm, looked after his stock, and could and did attend to his ordinary business affairs. There is no reliable evidence of compulsion or fraud on the part of the wife. It is sufficient to say that the issue of fraud, compulsion and undue influence tendered by the plaintiffs stands unproved. On the contrary, it is disproved by all the trustworthy evidence in the case.

3. The defendants insist that this is a suit to remove a cloud from the plaintiffs' alleged title as heirs, and that the suit cannot be maintained because the plaintiffs are not in possession; and in support of these propositions we are cited to *Davis v. Sloan*, 95 Mo. 552, and *Graves v. Ewart*, 99 Mo. 13. If those cases are examined with any degree of care it will be seen that a suit in equity to remove a cloud from a title may be maintained in those cases where the plaintiffs have no adequate remedy at law. So in *Keane v. Kyne*, 66 Mo. 216, the plaintiff had a remedy at law. Although the plaintiffs are not in possession, still if they have no remedy at law, a court of equity will entertain a bill to remove the cloud. Story, Eq. Jur. [12 Ed.] sec. 700, note 4; Pomeroy Eq. Jur., sec. 1399, note 4.

The property in question was the homestead of the deceased, and the widow who is a defendant in this case has a homestead right therein, though the deed is invalid, and this right is exclusive in her, since the children are all adults. Besides this the widow has the right to remain in possession of the mansion house and plantation thereto belonging, until dower is assigned to her, and that has not been done in this case. For these reasons the plaintiffs cannot recover in ejectment, even if the deed should be held to be of no validity, and they, therefore, have no remedy at law.

The jurisdiction in equity to remove a cloud is not only remedial, but it is also preventive. It is right and proper that the question as to the validity of the deed should be determined while the evidence is at hand,

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and if it is invalid it should be so declared, so as to prevent distant vexatious litigation. Story, Eq. [12 Ed.] sec. 700; *Gardner v. Terry*, 99 Mo. 523.

4. The real question in this case is that concerning the alleged non-delivery of the deed. The evidence bearing upon this issue is in substance this: William Sneathen owned and resided upon the one hundred and twenty acres of land now in question, and he also owned another forty-acre tract. His wife, Perdilla, owned another forty acres and also a one-fifth interest in her deceased father's estate. Sneathen went to a justice of the peace and requested him to prepare four deeds, at the same time explaining the reason why he desired to execute them. There was no haste in the matter, and in about four weeks thereafter the justice prepared the deeds and took them to the Sneathen residence as requested, where they were all executed and acknowledged at the same time on March 24, 1881.

Besides the deed in question, Sneathen and his wife executed another conveying to Jennie Brown the forty-acre tract owned by Mr. Sneathen. Jennie Brown was a married daughter of Mrs. Sneathen by her first marriage. This deed also reserved to the grantors a life-estate. The other two were deeds of quitclaim releasing to Mrs. Sneathen the forty acres owned by her and her interest in her father's estate. The justice testified: "After the deeds were made Mr. Sneathen asked me who should pay for the recording. I replied it was customary for those receiving them to pay for the recording. He then started for the press with them; then he said: 'What shall I do with them?' Before I had time to answer he turned to Mrs. Sneathen and said: 'Here are your deeds; and give the others their deeds the first time you see them.' She took the deeds and put them away, with the remark that she would give them the deeds the first time she saw them."

The evidence of Mrs. Sneathen is in these words: "After he had executed the Anderson deed, he handed

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the deed to me and told me to put it away and give it to Malcom Anderson, or his brothers, the grantees therein, the first time they came up. And the first time I saw them I gave it to them. I placed the deed away in a trunk with his other papers. After I had put the deed away he never called for it and it remained uninterruptedly in that place until I gave it to them."

And Malcom Anderson, one of the grantees, says: "On Sunday that my grandfather was buried and after the burial, I saw this deed; had not seen it before; the deed was handed me by Mrs. Perdilla Sneathen. I took it home with me; Mrs. Sneathen was lying on the bed at her house, and the deed was on the bed at her side. She handed it to me and said: 'Now, all I want is my life-estate.'"

There is other evidence to the effect that after the death of Mr. Sneathen, and on the day of the funeral Mrs. Sneathen requested Jennie Brown to get the deed out of a little trunk; that she got it and gave it to Mrs. Sneathen who gave it to Wm. Anderson, the father of the grantees; that he examined it and gave it back to Mrs. Sneathen who then handed it to Malcom Anderson, one of the grantees, and he caused it to be recorded. It appears the deed to Jennie Brown was placed in her possession shortly after its execution. Her husband testified that he went to Stewartsville, where the Anderson boys resided with their father, with Mr. Sneathen, after these deeds had been executed, and on that trip Sneathen said, "He wished he had got the deed to the Anderson boys and brought it down with him and given it to them." While at Stewartsville Sneathen inquired for Malcom, saying he wanted to see him, but Malcom was not at home. The record shows that two of the boys, namely, Emory and William, defended this suit by guardian, so they must have been minors when the deed was executed, and we infer that Malcom was also a minor at that date.

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Delivery of a deed is, of course, an essential element of a valid transfer of title to real estate, and it must take place during the life of the grantor; for a deed cannot be made to perform the functions of a will. But the delivery need not be to the grantee in person. A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor is dead at the date of the last delivery; for the delivery takes effect by relation as of the date when first made to the third person. In such cases it should appear that the grantor parted with all dominion and control over the instrument, intending it to take effect and pass the title as a present transfer. This intention may be manifested by acts, or by words, or by both words and acts. *Burke v. Adams*, 80 Mo. 506; *Standiford v. Standiford*, 97 Mo. 231; Tiedeman on Real Prop., sec. 814. We do not consider in the foregoing propositions those cases where the deed is placed in escrow, for there is no evidence of an escrow in this case.

Now when the deed in question and the one to Jennie Brown were executed and acknowledged, Sneathen gave them to his wife with directions to put them away and give them to the grantees the first time she saw them. There were no conditions whatever attached to this delivery to her. He parted with them without any reservation. The evidence shows, too, that he had determined to convey all of his real estate to these grantees, and that all of the deeds were executed and acknowledged pursuant to that formed and expressed design. The fact that these two deeds reserved a life-estate to the grantor and his wife is evidence that he intended they should take effect as conveyances before his death. It is true, that Mrs. Sneathen placed the deed in a trunk with the grantor's other papers where he could repossess himself of them if

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he desired to do so. But the rule that the grantor must part with all dominion and control over the deed does not mean that he must put it out of his physical power to procure possession of it. It is sufficient that the deed is delivered to the third person for the grantee without reservation and with the intention that it shall take effect and from that time operate as a transfer of the title.

Cases are not wanting where a delivery has been held to be good though the grantor retained possession of the document. The intention is the important element and as we have said that may be manifested by acts or words or both. The circumstance that Sneathen on the trip to Stewartsville expressed to Mr. Brown a regret that he had not brought the deed with him and given it to the boys does not tend to show that there had not been a delivery to his wife for them, but rather tends to show that he regarded the transfer of the title to them as a fixed fact. The circumstances under which the deed was made and the directions given by Sneathen when he handed it to Mrs. Sneathen show quite conclusively that he then parted with all control over it, and intended that it should operate as a present transfer of the title to the land.

No suggestion is made, nor do we see any reason, why the wife of the grantor may not be the third person, within the rules before stated, to whom the deed is delivered for the grantees.

The evidence shows beyond all doubt that the Anderson boys, the grantees, knew nothing of the deed until after the death of their grandfather, the grantor; but this fact does not affect the result, for they were minors and the deed was manifestly to their advantage. When the grantees are infants, the law presumes assent on their part to a beneficial conveyance, and knowledge of the conveyance and delivery is not essential. *Tobin v. Bass*, 85 Mo. 654; *Standiford v. Standiford*, *supra*; Tiedeman on Real Prop., sec. 814.

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There is nothing in the cases of *Huey v. Huey*, 65 Mo. 689, and *Hammerslough v. Cheatam*, 84 Mo. 13, to which we are cited by the defendants in error, which is in conflict with what has been said. Indeed, the principles of law asserted in those cases, so far as they are applicable to this case, are in accord with the rules of law here declared. It appears the circuit court decided this case on the theory that there had been no delivery of the deed in question, and in this ruling the court erred. As the court erred in this respect and as the decree cannot be supported on any or all of the other allegations in the petition, the judgment is reversed and the petition dismissed for want of equity. The other judges concur.

GURLEY V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

DIVISION TWO.

1. **Railroad : FOOTWAY : PUBLIC CROSSING.** The public use of a footway as a crossing over a railroad track, with the acquiescence of the company, does not convert it into a public crossing within the meaning of Revised Statutes, 1889, section 2808.
2. — : — : —. Nor does such use and acquiescence devolve upon the company the duty of maintaining the footway as a public crossing and of keeping it open and unobstructed, subject to the statutory penalties for failure to do so.
3. — : — : NEGLIGENCE. The company cannot, however, because such way is not a public crossing negligently and recklessly run its cars over persons who are in the habit of using it as a crossing.
4. — : — : —. If it discovers such person on said crossing, it is its duty to use every precaution to prevent injuring him.

104	211
48a	85

104	211
112	251
51a	109

104	211
119	271

104	211
121	12

122	145
123	241

123	248
123	260

60a	210
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104	211
147	158

148	79
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104	211
e166	444

166	445
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104	211
172	*190

96a	*678
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5. **Negligence: OPENING BETWEEN CARS: IMPLIED INVITATION.** Where a railroad company was in the habit of making an opening in its trains at a point on its track to enable the public to cross and a traveler on coming to said crossing found the cars so separated as to induce him and the public to believe that the company intended that it should be used for a crossing, and he did so believe, then he was justified in acting on such implied invitation and the company owed the duty, under the circumstances, of giving him some reasonable or suitable warning of its intention to close the opening, and would be liable if it neglected to do so, and because of such neglect he was injured while passing through.
6. ———: ———: ———. Where, however, the railroad, in such case, had placed its cars in such close proximity that it was dangerous or hazardous for anyone to pass between them, and it would appear to a reasonably prudent man that the company did not intend the public should use said opening as a crossing then the implied invitation to pass was revoked and a traveler is not justified in risking himself between the cars.
7. **Evidence: INCREDIBLE STATEMENT.** A statement in evidence may be so contradictory of general knowledge that no court is bound to believe it.
8. **Verdict: EXCESSIVE DAMAGES, PRACTICE IN SUPREME COURT AS TO.** The supreme court will not, because the damages awarded by the verdict of a jury are excessive, indicate a sum to be remitted so that on such *remittitur* being entered judgment may be affirmed as to the residue.
9. ———: ———. Such excessive verdict will not be disturbed by the supreme court, unless, on its face, it appears to be the result of passion or prejudice, and where it does so appear to be the result of passion or prejudice it will be set aside entirely.

Appeal from Cass Circuit Court.—HON. C. W. SLOAN,
Judge.

REVERSED AND REMANDED.

THIS is an action for damages based upon the alleged negligence of defendant in carelessly and negligently driving and forcing certain loose cars on its house or sidetrack, in the town of Pleasant Hill, Missouri, against some stationary cars, near a crossing on said track, whereby the plaintiff was, without warning, caught

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between the cars on the crossing, and the fleshy portion of his thigh mashed.

The answer was a general denial, and further alleged that said crossing was not the only means of access for footmen to defendant's said depot or platform at the northerly end thereof; but defendant avers that the truth is that said crossing was not a public one, but only a private path or footway across one of its tracks in Pleasant Hill, for the use of the employes of defendant; that defendant's said depot at Pleasant Hill is located between two streets, laid out nearly parallel with each other, and crossing the tracks of defendant; that it has a platform upon which persons having business with it at its said depot approach the same, to which platform its depot is connected, extending to each of said streets; that the north boundary of the street on the south side of its depot is a short distance from where plaintiff attempted to cross the track, as alleged in his petition; that plaintiff had resided for many years in the city of Pleasant Hill, and was well acquainted with the locality, and knew, or ought to have known, that the two streets aforesaid were such crossings as are contemplated by the statute, and that the place where he received his alleged injuries was not such a crossing.

And defendant further avers that said plaintiff knew, or ought to have known, that the track over which he attempted to cross and received his alleged injuries, as stated in his petition, and lying between the streets aforesaid, was daily and habitually used by defendant as a sidetrack for its trains to pass each other, and upon which to make up trains, and for the temporary storage and loading of its cars, without giving any signal or warning; that the space between the cars, between which plaintiff attempted to cross, was a narrow one, the said cars being close together, with barely room for a person to pass between them; and defendant avers that the said plaintiff, in attempting

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to pass between the said cars under the circumstances and surroundings hereinbefore set forth, voluntarily took upon himself the risk of such attempt, and any injuries which he received thereby were caused in whole or in part by his own negligence and carelessness, which directly contributed thereto.

Evidence: The evidence introduced by plaintiff tended to show that about the years 1865 or 1866 the then owner of the Planters' House, a Mr. Brown, laid two planks from his house to the depot, for the convenience of the boarders at his house. About the year 1872 Mrs. Henry took the house, and it was used as an eating house for defendant, and it had a walk from the hotel to the depot platform for the convenience of its patrons. In 1875 the house was abandoned for this purpose, and the Atlantic House was used as an eating-house by the railroad company; that the proprietor of the Planters' House, for his own convenience, took up and relaid the walk, and kept it in repair after the eating-house was changed to the other hotel; that from the Planters' House to the depot, by way of this walk, was thirty steps nearer than to go by the way of the public street and walk; that the depot is constructed between Wyoming and Commercial streets in Pleasant Hill, which are parallel with each other, and the depot platform on the south, extending from one street to the other; that there was at that time an open space between the two streets north of the depot, where people could and did cross the tracks; that the track at which the injury occurred was north of the depot, and was a switch called the house or team and delivery track, where for years all the transfers were made, change of freight, loading and unloading, and where those cars were made up into trains, and was used sometimes as a passing track; that the defendant was continuously setting cars on that track, and taking them out; that the crossing was closed a great deal of the time by cars standing across it; that it was not a public road or crossing, but

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a private one, and was kept open or closed as the business of the defendant demanded.

This track had a descending grade from Wyoming street towards the crossing, and plaintiff's evidence disclosed the fact that boys had frequently been seen to take off the brake on the cars standing thereon, and they would start and run down the track by their own weight. The plaintiff's evidence tended to show that just before the injury cars were seen moving in the yard west of Wyoming street, and were kicked in on this switch track by an engine in the yard. No one, however, saw the accident but plaintiff and his son. One of the plaintiff's witnesses testified that he had just crossed between the cars when he met the plaintiff going towards them; that the space was so narrow that he was obliged to go through sideways; that it was such a dangerous place, by reason of the proximity of the cars, that he expected that either he or some one else would get injured there, and as soon as he heard plaintiff halloo he knew he had got hurt.

The plaintiff's son testified that he was with his father when he was hurt; that he (the son), when he got within two feet of the car, stopped and listened. At that time his father was half a foot ahead of him. He saw no engine nor moving cars. He says: "My father went in between the cars before I did. When my father went through I was right behind him. At the time he was struck, I just had my hands on the side of the cars, one hand on each car. I was going through if he got through all right. I concluded I could not get through I thought I would get through if he got through all right."

The plaintiff himself testified that at the time of the trial he was sixty-two years of age, and had lived in Pleasant Hill since 1871; that on the twenty-second day of January, 1886, a little after eight o'clock in the evening, he, with his son, started for the defendant's

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depot on business of his own, but not with the defendant; that he went on the walk from the Planters' House, and when he got to the track he stopped and looked both ways. Had been "going across railroad tracks a good many years, and it was natural for me to look both ways, and saw no indications of any moving train. Did not hear anything. Heard no signal. After I looked and listened, I started to go through, and it seemed to be instantaneous, for as soon as I got through between the drawheads there was a crash came and the racket seemed to be right upon me." He further testified that he knew the purpose for which the sidetrack was used. He had frequently passed over that walk for a good many years, and frequently passed between the cars. Sometimes the cars were closer together than others. At this time there were two or three feet between the drawheads of the two cars. Plaintiff had passed through between the cars two hours before his injury. He was confined to the house about three months as the result of his injury. His physicians' bills were \$165, and expenses for nursing were \$51, which he expected to pay when he was able. He was a traveling man, earning \$4 or \$5 per day, selling on commission before his injury, and could not then make as much.

From the testimony of the physicians examined by plaintiff it appears that the injury consisted of a lacerated wound on the inner surface of the thigh, the deepest part of which was three-quarters of an inch. It involved no bones, but was simply a flesh wound. Dr. Beattie, who was appointed to examine the plaintiff, testified that he discovered a scar in front of plaintiff's thigh, measuring twelve inches in length. There was no injury to the bone, but was confined to the soft tissues. There was nothing to lead the doctor to believe that any muscle was destroyed, but was told by plaintiff that one motion of the limb was impaired; that was

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the motion of crossing the limb on the other; that the wound was entirely healed, and that there was nothing in the wound itself that would indicate that plaintiff was then suffering, or that would impair the usefulness of the limb.

The court, in plaintiff's second instruction, told the jury that if they believed from the evidence that defendant erected and maintained, or, after erecting, permitted others to maintain, a public crossing at said point, over its sidetrack, at which persons going to and from said depot were in the habit of crossing said sidetrack, with the permission, consent or knowledge of the defendant's agents, servants or employes; that defendant was in the habit of keeping such of its cars as were not required for immediate use at such points on its sidetrack; that at the time of the alleged accident defendant had some of its cars standing on said sidetrack, at said crossing, some on one side and some on the other side of said crossing; that they were uncoupled thereat and separated so as to permit footmen to pass between them at and on said crossing, in going to and from said depot; that while said cars were so standing and separated at said crossing the plaintiff attempted to pass thereat, for the purpose of reaching said depot; that, at the time plaintiff so attempted to pass between said cars at said crossing, defendant, by its agents, servants or employes, in the use of a locomotive or switch-engine under their control, struck, at the northerly end of said sidetrack, the stationary cars so standing thereon, or struck another loose car standing thereon, and drove them on and against said cars so standing and separated at said crossing, and thereby suddenly, without signal or warning, closing said opening, whereby said cars, at said opening, were driven on and against plaintiff, and he was caught between them, on or at said crossing; and that he thereby, and by reason thereof, received the injuries complained of in his petition—they are instructed that these facts, if

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they existed, constitute negligence on the part of the defendant, and will find the issues for plaintiff. The defendant prayed the court to instruct the jury to return a verdict in its favor. The jury returned a verdict for the plaintiff for \$15,500, upon which judgment was rendered.

H. S. Priest for appellant.

(1) The demurrer to the evidences should have been sustained. The plaintiff was a bare licensee at most; he was upon his own business for his own exclusive benefit and defendant owed him no duty except that of not wilfully or wantonly injuring him. *Sweeney v. Railroad*, 10 Allen, 368; *Shear. & Redf. Neg.*, sec. 499; *Hounsell v. Smyth*, 7 C. B. (N. S.) 729; *Binks v. Railroad*, 32 Law Jour. (N. S.) Q. B. 26; *Lary v. Railroad*, 78 Ind. 323; *Carleton v. Franconia & Co.*, 99 Mass. 216; *Harris v. Stevens*, 31 Vt. 79-90; *Nurray v. McLean*, 57 Ill. 378; *Durham v. Musselman*, 18 Am. Dec. 133; *Reardon v. Thompson*, 21 N. E. Rep. 369; *Cusick v. Adams*, 21 N. E. Rep. 673; *Larimore v. Iron Co.*, 4 N. E. Rep. (2) Plaintiff's instructions, numbered 1, defining the issue is wrong. (3) Plaintiff's instruction, numbered 2, is not the law. It introduces an element of recovery not laid in the declaration; that is, the failure to warn plaintiff of the cars. (4) The instruction, numbered 3, as to the measure of damages is erroneous. It directs the jury to allow the plaintiff such sum as "you may, from the evidence, believe he ought to recover." Then follow specifications of points of damage in favor of plaintiff, which the jury are told they must take into consideration. It is not the law that the only limitation upon the amount of recovery is the *ad damnum* clause in the petition and what the jury believe the plaintiff ought to have. The jury exercised their unlimited discretion with unbounded generosity towards the plaintiff. (5) The objection to the introduction of any evidence

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under the petition should have been sustained. This was ruled when the case was here before (93 Mo. 445), and the petition was not amended. (6) The language used by the plaintiff's attorney—"that defendant has more power in this country than the Czar of Russia has in his," and its repetition upon objection was an outrageous abuse of fair debate, and was artfully designed to accomplish the excitement of a morbid sentiment in the minds of the jury which would lead them to act unfairly and unjustly towards the defendant. (7) The verdict is unconscionable. It is nothing short of robbery under the guise of legal proceedings. It ought not to be allowed to stand. *Sawyer v. Railroad*, 37 Mo. 240; *Waldhier v. Railroad*, 87 Mo. 37; *Furnish v. Railroad*, 13 S. W. Rep. 1044; *Adams v. Railroad*, 100 Mo. 555; *Sioux City v. Finlayson*, 16 Neb. 578-591; *Collins v. City*, 35 Iowa, 432; *Rose v. Railroad*, 39 Iowa, 256; *Potter v. Railroad*, 22 Wis. 615; *Spicer v. Railroad*, 29 Wis. 580.

Adams & Buckner also for appellant.

(1) The defendant's demurrer to the evidence should have been given. There was no evidence of any negligence or carelessness in causing the cars to collide with each other. *Railroad v. Godfrey*, 71 Ill. 500; *Donaldson v. Railroad*, 21 Minn. 293; *Tennbroek v. Railroad*, 59 Cal. 269; *Railroad v. Huffman*, 28 Ind. 287; *Houston v. Railroad*, 95 U. S. 297; *Morrissey v. Railroad*, 126 Mass. 377; *Railroad v. Goldsmith*, 47 Ind. 43; *Mason v. Railroad*, 27 Kansas, 83; *Railroad v. Hammett*, 44 Ohio St. 375; *Railroad v. Aikin*, 130 Pa. St. 38; *Casey v. Railroad*, 15 Ont. 574; *Rogstadt v. Railroad*, 31 Minn. 208; *Stillson v. Railroad*, 67 Mo. 671; *Kelley v. Railroad*, 75 Mo. 138. (2) The court erred in giving the plaintiff's second instruction. *Railroad v. Godfrey*, 71 Ill. 500; *Nicholson v. Railroad*, 41 N. Y. 542; *Sutton v. Railroad*, 66 N. Y. 243; *Railroad v. Marion*, 104 Ind. 239; *Bunker v. Covington*, 69 Ind. 37;

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Railroad v. Depew, 40 Ohio St. 128; *Finlayson v. Railroad*, 1 Dill. 579. (3) The language used by plaintiff's counsel in his argument was calculated to influence the passions of the jury. It was the duty of the court to check and reprimand counsel in the presence of the jury. *Loyd v. Railroad*, 53 Mo. 509; *Roeder v. Studd*, 12 Mo. App. 566. The damages are grossly excessive. *Sawyer v. Railroad*, 37 Mo. 240; *Waldhier v. Railroad*, 87 Mo. 37; *Furnish v. Railroad*, 13 S. W. Rep. 1044; *Adams v. Railroad*, 100 Mo. 555; *Sioux City v. Finlayson*, 16 Neb. 578-591; *Collins v. City*, 35 Iowa, 432; *Rose v. Railroad*, 39 Iowa, 256.

R. T. Railey and Whitsett & Jarrott for respondent.

(1) The public had acquired an easement across defendant's sidetrack, and plaintiff was not there as a trespasser at the time of his injury. *State v. Walters*, 69 Mo. 436; *State v. Wells*, 70 Mo. 637; *Zimmerman v. Snowden*, 88 Mo. 220; *State v. Proctor*, 90 Mo. 337; *State v. Bradley*, 31 Mo. App. 318; *Byrne v. Railroad*, 58 Atl. Rep. 512. (2) Plaintiff having been injured at a public crossing for footmen it was the duty of defendant, when approaching said crossing with its train, or cars, to give proper signals and warning, and a failure to do so constitutes negligence. R. S. 1889, sec. 2608; *Crumpley v. Railroad*, 98 Mo. 38. (3) Defendant was bound to give plaintiff and others using said crossing proper and timely warning before closing the same. Its failure to do so was negligence. *Nichols v. Railroad*, 32 Am. & Eng. R. R. Cases, 27-30, and cases cited; *Harriman v. Railroad*, 12 N. E. Rep. (Ohio) 455. Numerous authorities are cited and discussed in this case. *Kelley v. Railroad*, 6 Am. & Eng. R. R. Cases (Minn.) 264; *Barry v. Railroad*, 92 N. Y. 289; *Davis v. Railroad*, 58 Wis. 646; *Byrne v. Railroad*, 104 N. Y. 362; *Graves v. Thomas*, 95 Ind. 361; *Campbell v. Boyd*, 88 N. C. 129. (4) *First*. The courts

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of the country are authorized to take judicial notice of the census returns. *Topeka v. Gillet*, 32 Kas. 437. *Second.* The United States census for 1880, volume 1, page 203, reports the population of Pleasant Hill in 1880 at twenty-three hundred and seventy-two inhabitants. *Third.* Greater care and caution are required of railroad companies in handling their trains in a populous city than in the country. *Brown v. Railroad*, 50 Mo. 467; *Maher v. Railroad*, 64 Mo. 276; *Hicks v. Railroad*, 64 Mo. 439; *Harlan v. Railroad*, 65 Mo. 24; *Frick v. Railroad*, 75 Mo. 609. (5) It is negligence *per se* for a railroad company, when approaching a crossing, to make a running or flying switch. Defendant was violating its duty in this respect in the case at bar at the time plaintiff was injured. *Brown v. Railroad*, 32 N. Y. 597; *French v. Railroad*, 116 Mass. 537; *Hinckley v. Railroad*, 120 Mass. 257; *Butler v. Railroad*, 28 Wis. 487; *Railroad v. Troutman*, 6 Am. & Eng. R. R. Cases (Pa.) 122; 1 Rorer on Railroads [1 Ed.] p. 491, sec. 3, and cases cited. (6) If the court should hold that the place where plaintiff was injured was a public crossing, and that defendant failed to give any signal as required by section 2608 of the Revised Statutes of 1889, then it devolved upon defendant to show that plaintiff was not injured by reason of its failure to give any signal. This it signally failed to do, and plaintiff was entitled to recover as a matter of law. *Ernst v. Railroad*, 35 N. Y. 27; R. S. 1889, sec. 2608. (7) Plaintiff had the right to assume that defendant in handling its cars would act with appropriate care; that the usual signals of approach would be seasonably given, and that the managers of the train would be attentive and vigilant. Defendant signally failed to comply with the foregoing requirements, and was, therefore, guilty of negligence, which directly contributed to plaintiff's injury, and plaintiff was free from contributory negligence. *Donohue v. Railroad*, 91 Mo. 363 and 364, and cases cited;

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Ernst v. Railroad, 35 N. Y. 27; *Petty v. Railroad*, 88 Mo. 318; *Johnson v. Railroad*, 77 Mo. 546; *Shearman & Red. on Neg.* [3 Ed.] sec. 31; *O'Connor v. Railroad*, 94 Mo. 157; *Kennayde v. Railroad*, 45 Mo. 261; *Tabor v. Railroad*, 46 Mo. 356; *Loucks v. Railroad*, 31 Minn. 534; *Reeves v. Railroad*, 30 Pa. St. 454; *Langhoff v. Railroad*, 19 Wis. 489. (8) Where the evidence is undisputed, and fair-minded men of ordinary intelligence might honestly differ as to whether or not such facts show negligence upon the part of defendant, then it is peculiarly a question for the jury, and the court has no right to dispose of the matter as a proposition of law. *Kennayde v. Railroad*, 45 Mo. 225; *Norton v. Ittner*, 56 Mo. 351; *Mauerman v. Siemerts*, 71 Mo. 101; *Petty v. Railroad*, 88 Mo. 316; *Huhn v. Railroad*, 92 Mo. 450; *Tabler v. Railroad*, 93 Mo. 85; *Chouteau v. Iron Works*, 94 Mo. 399; *Stephens v. Railroad*, 96 Mo. 212; *Wagner v. Railroad*, 97 Mo. 523; *Barry v. Railroad*, 98 Mo. 71; *Weber v. Railroad*, 100 Mo. 201; *Adams v. Railroad*, 100 Mo. 570 and 571. (9) The damages in this case are not excessive. *Berg v. Railroad*, 50 Wis. 419; *Railroad v. Mackey*, 22 Am. & Eng. R. R. Cases (Kansas) 306; *Ferguson v. Railroad*, 19 Am. & Eng. R. R. Cases, 285; *Railroad v. Dorsey*, 25 Am. & Eng. R. R. Cases (Texas) 446; *Dougherty v. Railroad*, 97 Mo. 648; *Railroad v. State*, 12 Am. & Eng. R. R. Cases, 149; *Whalen v. Railroad*, 60 Mo. 323; *Pry v. Railroad*, 73 Mo. 124; *Waldheir v. Railroad*, 87 Mo. 37. (10) The jury in the first trial returned a verdict for \$10,000, Defendant under the reversal of this court obtained another trial before a different jury and a verdict for \$15,500 was returned. As the defendant has had two trials before different juries, this court should not award a third trial for excessive damages. *Goetz v. Ambs*, 22 Mo. 170; s. c., 27 Mo. 33 and 34; *Porter v. Railroad*, 71 Mo. 68.

GANTT, P. J.—This is an action for damages for personal injuries. At the time plaintiff was hurt he

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was attempting to pass between the cars standing on the house or storage track of defendant's railroad in Pleasant Hill, Missouri. The charge in the petition is that defendant, without warning, violently forced its cars together, just as plaintiff was passing through, and the fleshy portion of his leg, from his thigh down, was bruised and mashed. The answer was a general denial and contributory negligence.

Negligence is a relative term. In every action for negligence of another there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. So in this case the important question arises at once, what duty did defendant owe the plaintiff in protecting and guarding him at this crossing at the time he was hurt, and what were their relative rights and obligations with respect to each other? On the one hand, plaintiff maintains with great earnestness that this was a public crossing, and that defendant owed it to plaintiff to ring the bell upon its engine or sound its whistle before attempting to close said crossing with its cars. On the other hand, defendant urges that this was in no sense a public crossing; that no street or highway of any character crossed its track at this point; that its duty to ring the bell or sound the whistle was statutory, and had never been extended beyond the duty imposed by the statute; that all that could be affirmed under the evidence was that plaintiff was a licensee; that defendant had permitted footmen to pass over its track at this point when not blocked by its cars without protest; that none of the statutory obligations devolved upon it with reference to this crossing; that plaintiff, having lived for many years in Pleasant Hill, knew that this was simply a sidetrack on which defendant loaded and unloaded cars, and in so doing was constantly putting in and taking out cars, and knew that it was not the duty or custom of defendant to ring the bell or blow the whistle in moving its cars in and out on this track, and, so knowing,

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recklessly exposed himself, without the knowledge of defendant. Inasmuch as a proper determination of the other questions in the case depends largely upon the ruling as to the character of this crossing, we proceeded to examine this question.

F. D. Mers, a witness for plaintiff, testified he had lived in Pleasant Hill since 1867. In regard to this crossing he says: "The first sidewalk was put down in 1865. Two planks were put down by Mr. Brown, who then owned the Planters' House. It was called the 'Sherman House.' Two boards were put down to the depot. After they run awhile the railroad company put down a platform for the convenience of the passengers to go from the depot up to the eating-house. It was made out of wood. A plank walk has been maintained there since. * * * I don't know who paid for the walk, but I know the railroad company's men did the work. Mrs. Henry gave up the house, I think, in 1875. Then the eating-house was changed to the Atlantic hotel. When the walk got out of repair I fixed it myself. * * * I took it up myself, and put it down myself, or had it done, after the railroad company changed from my eating-house to the Atlantic. *Then, for my own convenience, I kept it in repair; that is what I did it for. The city would never do it.*" Over this walk, so maintained in the interest of the Planters' House, a hotel immediately in the rear, on the hill back of and behind defendant's depot, the people passed, *when* it was not blocked by the cars of defendant, without objection from defendant or its agents. This walk crossed this sidetrack that ran in the rear of defendant's station-house. This track was used for loading and unloading cars, and the defendant was constantly putting cars in and taking others off of this track.

Plaintiff was a commercial traveler of long experience in traveling on railroads. Was a man fifty-nine years of age. Had lived in Pleasant Hill since 1871,

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and was well acquainted with the use to which this sidetrack was put. Some of the witnesses called this a *public crossing*, but they all agree that by this term public they mean simply that the citizens of Pleasant Hill were in the habit, many of them, of walking across from the Planters' House to the depot. None of them pretend there was a street or alley crossing defendant's track at this point. It was simply a footpath that had been used because it was some thirty steps nearer than the regular street crossings east or west of the depot. On the evening plaintiff was hurt the witnesses say that before dark there was a space of some three or four feet between the cars at this crossing. But the last witnesses who passed through before plaintiff was hurt say that the cars were so close that a man could barely get through; one, the last who passed, saying that "he had to turn sideways to get through." Plaintiff's son, who was with him, says he didn't think he could get through; that while his father was trying to get through he had his hands on the cars on either side of the crossing, and stood waiting to see if his father got through.

Now, what is meant by a *public crossing* in the instruction of the court and the brief of plaintiff? We take it, it can only refer to the public crossings mentioned in section 806, Revised Statutes, 1879; section 2608, Revised Statutes, 1889; because respondent in his brief insists that it was the duty of defendant to ring the bell or blow the whistle before its cars approached said crossing, and because it is well established in this state that it is only necessary to ring or whistle in approaching street or road crossings. *Dahlstrom v. Railroad*, 96 Mo. 99; *Stillson v. Railroad*, 67 Mo. 671. The statute requiring the bell rung or whistle blown at public roads or street crossings is a wise one. At these crossings the public have the right to cross at all hours, and it is but simple justice that, when a company

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crosses these highways with powerful and dangerous engines, it should give warning to those whose duty or inclination may call them over these crossings; but it cannot, we think, be affirmed, with equal reason, that a company, in its own yards, moving its cars up and down on its storage tracks, and not across any public road or street, is required to use the same extraordinary care as in the case of street or road crossings. The licensee who enters upon a railroad track at points other than public roads or streets may by long acquiescence not be a trespasser; but it is going too far to say that, because he is not a trespasser, his rights become paramount to that of the company to use its tracks for the transaction of its business. It is not only the right of the company to use its tracks without hindrance, but its duty to the public requires expedition in the handling and transporting of freight. It would reverse the natural order of things to require the company, in its yards and on storage tracks, to be constantly watching for trespassers and licensees. We think it more consistent with the general law and sound policy to require those who leave the highways, and the protection given by the law at these public street crossings, to go across these railroads at these private crossings, to use the utmost care and diligence in looking after their own welfare. This we understand to be the law of this state. "The obligations, rights and duties of railroad companies, and travelers crossing them, are mutual and reciprocal, and no greater care is required of one than the other." *Stillson v. Railroad*, 67 Mo. 671.

When this cause was here on a former appeal, this court held that defendant had a perfect right to stand its cars on this sidetrack, and there was no foundation in this petition for any charge of negligence against defendant for leaving its cars unsecured. To this opinion we still adhere. *Gurley v. Railroad*, 93 Mo. 445. Under this evidence, then, we hold this was not a public crossing, within the meaning of section 2608, and the

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argument of learned counsel based on this assumption is not tenable ; and we hold, moreover, that the instruction, numbered 2, given for plaintiff, permitting the jury to find this was a public crossing, was erroneous. It was misleading. While the public used this crossing by acquiescence of defendant as a footway, this use did not convert it into a public road or street crossing, within the meaning of the statute, and did not devolve upon the company the duty of maintaining it as a public crossing, and keeping it open and unobstructed, and visiting upon it the statutory penalties for failure so to do.

But, because it was not a public crossing, it does not follow that defendant might negligently and recklessly run its cars over persons who had been in the habit of crossing there. It has been repeatedly held by this court that greater care is to be exercised in running trains within the limits of towns and cities than is required in the country (*Frick v. Railroad*, 75 Mo. 595, and cases there cited), and that "a less degree of vigilance will ordinarily be required between the streets of a town or city than will be required at the street crossing, or when running longitudinally in a street ; but undoubtedly some vigilance is required even between streets, and the degree required will necessarily vary with the attendant circumstances." *Frick v. Railroad, supra*. And in that case it was held that, in the case of an adult, the court should qualify its instruction so as to direct the jury that the railroad company would only be liable in case its servants failed to exercise ordinary care to prevent the injury, after they became aware of the danger to which the traveler was exposed.

The relation of the plaintiff and defendant must be kept in view. This was not a public crossing. If it had been so, defendant would have owed plaintiff a positive legal duty ; but, being a mere private crossing, and plaintiff being a licensee only, defendant was bound not to recklessly injure plaintiff ; and, if it discovered him

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on the track, then it was its duty to have used every precaution to prevent any injury to him. It is evident that plaintiff did not frame his petition on the theory that this was a public crossing. Had he done so, he would have charged the failure to ring the bell or sound the whistle, but there is no allegation of failure in this respect. If plaintiff seeks to recover on this ground, it is clearly his duty to allege the facts constituting the negligence. Learned counsel seemed to recognize the force of this objection to their petition, and seek to parry the effect of it, by insisting that the answer of defendant amounts to an "express aider," and cures the petition. The allegation which they claim has this effect is the averment in the answer that plaintiff was well acquainted with the use of this sidetrack, and knew that the defendant in using this track was in the habit of moving its cars in and off this track without giving these statutory signals. We do not think the answer had the effect of curing the petition. It was the averment of a general course of conduct by defendant from which plaintiff was advised of the danger of attempting at any time to cross this track. It is not an admission that no signals were given at the time plaintiff was hurt.

Conceding, then, this was not a public street or road crossing, and that plaintiff was there as a licensee, and not a trespasser, and that defendant owed him the duty to use ordinary care in discovering his presence on the track, we next inquire into plaintiff's own conduct as affecting his right to damages. Plaintiff had been a citizen of the city since 1871. He was a man fifty-nine years old; a commercial traveler. He knew the premises well. Knew this was a side or storage track, constructed by the defendant to accommodate its freight business. He knew the defendant was constantly putting in and taking cars off of this track, in loading and unloading them. It must be taken, also, that the company was not in the habit of sounding the bells or

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blowing the whistles whenever they put a car in or took one out of this switch. Plaintiff was apprised that daily and nightly cars were moved over this branch or switch track, just as the convenience and requirements of defendant's business demanded. These cars were not moved on any regular schedule time, but might be expected to move at any time without warning or signals. Knowing all this, plaintiff comes to this crossing in the night-time. Now, it may be conceded that if when plaintiff came there the cars were opened as if to invite the public to cross, and it was the custom of the defendant when it had finished its switching to leave an opening between the cars at this crossing for the public, then unquestionably it would be the duty of defendant to give some suitable or reasonable warning before closing the same, for the protection of those who used the crossing, and plaintiff might well have supposed it would be safe to cross if he was not otherwise advised that the defendant was about to close this gap or opening, and acting upon this invitation he would be protected; but is plaintiff in a position to avail himself of such a theory in this case? Caldwell, one of his witnesses, the last man who passed through this train before plaintiff was hurt, testifies that he met plaintiff between the Planters' House and the crossing, only a few yards distant, and when he came through the train he had to *turn sideways* to get through, so close were the cars. "I thought it was a dangerous place, the way those cars were standing there."

Synnington, another of plaintiff's witnesses, testified in regard to the space between the cars: "I should judge just about room for a person to walk through; *barely room for a person to walk through.*" Hays Gurley, son of the plaintiff, who was with his father, testified: "My father went in between the cars before I did. When my father went through I was right behind him. At the time he was struck I just had my hands on the side of the cars, one hand on each car. I was

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going through, if he got through all right. I concluded I could not get through. I thought I would get through if he got through all right." The other witnesses, who went along earlier than this, say the cars stood from three to four feet apart. Under these circumstances, common prudence and care required of plaintiff to look and ascertain whether he could safely pass through that train, and common prudence dictated that he should not recklessly expose himself to the danger of being crushed between those cars. Their very position was a warning to a man of ordinary prudence to stay out. The plaintiff's conduct savors of reckless rashness. It has long been held that the neglect of an engineer of a train to sound its whistle or ring its bell on nearing a street crossing does not relieve a traveler in the street from taking ordinary precaution for his safety; that he is bound to use his senses, to listen and look, in order to avoid any possible accident from an approaching train; and, if he fails to do so, he takes the risk. *Stillson v. Railroad*, 67 Mo. 671. *A fortiori* ought a traveler, in the night-time, crossing in the yards or on sidetracks, to be careful of his conduct. In *Stillson v. Railroad*, this court used this language: "The space left between the two trains, even when the father of plaintiff went over to the hotel, twenty inches, *would not indicate any invitation, even to foot-passengers*. There was no evidence in the case that any person other than the father of plaintiff and one other person had ventured to cross at that point, and it is clear that, if the father had preceded his child so as to observe the diminished size of the aperture, he would not have advised her to attempt a crossing; certainly if he observed the locomotive at the west end, and made an attempt to cross himself, or advised his child to attempt it, *its recklessness would have been obvious*. It does not appear that any officer or servant of the company was aware that plaintiff was proposing to cross."

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In the recent case of *Hudson v. Railroad*, 101 Mo. 13, this court quoted with approval the language of the Maryland court in *State v. Railroad*, 31 Md. 366: "The fact that a train of cars is unlawfully blocking a crossing is no reason why a person should throw himself under the wheels or recklessly expose himself to danger."

In addition to the warning given by the proximity of the cars, plaintiff's other witnesses testify to the kicking in of the cars, and to the rattle and noise made by the cars as they came back from the west upon those near the crossing; and this is a matter of such general experience that it is hardly possible for plaintiff not to have heard these cars, had he used the common precaution of stopping before he went in between them. It is true that plaintiff says he stopped, looked and listened, and did not hear or see any cars moving; but the other witnesses are his also, and they testify to seeing the engine kick the cars on the switch, and to their movement and noise, continuously, up to the very moment plaintiff cried out. This evidence in connection with that of plaintiff's son that he stood there, and would not venture until he could see the result of his father's effort to cross, all goes to show that plaintiff acted in a reckless manner, and by his own negligence contributed to his own injury. If the warning was such that Caldwell thought it dangerous, and his own son stood back and would not attempt it, it ought to have been sufficient for plaintiff. By walking thirty steps further east, he could have crossed on a public street, with all the safeguards of the statute thrown around him for his protection.

The second instruction given for the plaintiff was erroneous in this: "Plaintiff's petition was not framed on the theory that this was a public crossing, and that he was entitled to have the bell rung or whistle sounded as required by the statute. It is evident it is based upon the facts, as alleged in the petition, that defendant had been in the habit of permitting footmen

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to go and come across said track, and had been in the habit of separating their cars at this crossing for that purpose, and that at the time plaintiff was hurt the cars were so separated."

If the court intended by this instruction to submit to the jury this question of the company inviting the public to cross, it was very unfortunate in its language. We hold that it should have distinctly said to the jury that if the company was in the habit of making these openings for the public to pass over its track at this point, and when plaintiff came to this crossing these cars were so separated as to induce plaintiff and the public to believe the company intended they should use it for a crossing, and he did so believe, then plaintiff was justified in acting upon this implied invitation, and defendant owed it to him, under such circumstances, to give him some reasonable or suitable warning of its intention to close this opening, and it would be liable to plaintiff if it neglected so to do. On the other hand, the court should have said to the jury that, if the company had placed its cars in such close proximity that it was dangerous or hazardous for anyone to attempt to pass between them, and it would appear to a reasonably prudent man that the company did not intend the public should use said opening as a crossing, then the implied invitation to pass was revoked, and plaintiff was not justified in risking himself between the cars at said crossing. This was a question for the jury, under the evidence and proper instructions. But this instruction was also erroneous in leaving it to the jury to say this was a public crossing. This was a misnomer and misleading. It allowed the jury to visit all the penalties for negligence at a public crossing. It is also erroneous in not requiring these various acts of defendant resulting in plaintiff's injury to have been negligently done; and in not requiring plaintiff himself to have been free from negligence directly contributing to his injury.

As this case must be retried, we must remark here that we have not been able to understand how plaintiff could have received the wound he did in the manner he details it. How a man of ordinary stature, walking between two ordinary freight cars, could have the fleshy portion of his leg, from his thigh down, eight or nine inches, mashed by the bumpers or drawheads, is beyond our comprehension. We regard this statement, as appears in this record, so contradictory to general knowledge that no court is bound to accept it. In the case of *Hunter v. Railroad*, 23 N. E. Rep. 9, in an action against a railroad company for personal injury by a brakeman who had struck his head against something while sitting on a box car, going through a tunnel, the negligence charged was not in giving plaintiff notice of a brick arch in the tunnel, which reduced its height to four feet, seven inches, above the top of the car. The supreme court took judicial notice that a man could not strike his head against an obstruction that distance above where he was sitting, unless he was nine feet high, and that no man was ever known to be nine feet high. To have received the wound the plaintiff did, in simply walking between the cars, if the cars were the ordinary freight cars, plaintiff must have been of remarkable stature. It may be, on another trial, some intelligent explanation can be given how this wound could have been made; there is certainly none in this.

One other point only remains to be noticed. If plaintiff is entitled to recover at all, the verdict herein is excessive. It is in evidence that no bones were broken; no muscles destroyed. Plaintiff was able in eight or nine months to resume his work as a commercial traveler. We are asked by counsel to make the proper deduction, and they will remit. We are aware that this court has in cases heretofore indicated how much should be remitted, but, speaking for ourselves, we think that, whenever the verdict does not upon its face appear to be the result of passion or prejudice, it is

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wholly within the province of the jury; but when it does so appear, then it ought to be set aside. We have no scales by which we can determine what portion is just, and the result of reason, based upon the evidence, and what part is poisoned with prejudice and passion. We do not think it within our province to assess the damages. When we set aside any part of the verdict, we destroy its integrity, and we have no right to set ourselves up as triers of facts, and render another and different verdict. We think the only logical course in such cases is to let the verdict stand or set it aside as an entirety. For these reasons we reverse the judgment, and remand the cause. All the judges of this division concur.

RODDY V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

DIVISION TWO.

1. **Actionable Negligence, What Constitutes.** Actionable negligence consists in the breach or non-performance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby.
2. ——— : **CONTRACT : THIRD PERSON.** A third person cannot maintain an action for injuries resulting from a breach of contract arising purely out of the terms of the agreement between the contracting parties.
3. **Negligence : BREACH OF CONTRACT : INJURY TO THIRD PERSON.** Although the contract under which a railway company furnishes to a quarry owner, on his own sidetrack, cars for the transportation of stone, requires it to see that the cars are provided with proper brakes, it is not liable to a servant of such quarry owner who is not a party to the contract and over whom it has no control, for injuries resulting from the company's breach of its contract with the quarry owner.

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92a *120

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4. ——— : ——— : **LIABILITY TO THIRD PERSONS.** Such contract, however, being for the mutual benefit of the quarry owner and the railroad company, the latter in furnishing the cars, which was a matter devolving exclusively on it, was bound to use ordinary care to furnish such as were reasonably safe for the quarry owner and his servants.
5. ——— : **INDEPENDENT CONTRACTOR.** An employer is not responsible for the negligence of a contractor or his servants where such contractor is given entire freedom in the use of means to accomplish the result.
6. ——— : ———. Where the employer, however, reserves the right to direct the manner of performance in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and his employes the exercise of care in that regard.
7. ———. A car with defective brakes is not such an imminently dangerous instrument as to render the railroad company liable to one injured thereby in the absence of any contractual or other relationship.
8. ——— : **QUESTION FOR JURY.** Where on the issue of contributory negligence fair-minded and sensible men may differ in their conclusions, the question is one for the jury and this is true although there is no dispute as to the facts.
9. **Contributory Negligence: DEFECTIVE CAR.** Where one to whom a railroad company owes the exercise of due care is furnished with a car having a defective brake and is injured thereby, he cannot recover for such injury, if he knew that defective and dangerous cars were frequently left by the company for his use and could have ascertained by reasonable care on his part the defect in the car causing the injury.
10. ——— : **QUESTION FOR JURY.** Whether the plaintiff was guilty of contributory negligence in not exercising reasonable care to ascertain the condition of the car was a question for the jury.

Appeal from Johnson Circuit Court.—HON. CHAS. W. SLOAN, Judge.

REVERSED AND REMANDED.

Adams & Buckner for appellant.

(1) The court erred in refusing to give the defendant's instruction at the close of the evidence, that the plaintiff could not recover. *Banking Co. v. O'Hara*,

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46 Ga. 417; *Bendict v. Chandler*, 26 Ohio St. 393; *Maguire v. Magee*, 13 Atl. Rep. 551; *Heaven v. Pender*, 9 Q. B. Div. 303; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Kahl v. Love*, 8 Vroom (N. J. L.) 5-37; *Collis v. Selden*, 3 L. R. C. P. C. 495; *Burke v. Refining Co.*, 18 N. Y. 354 (11 Hun.); *King v. Railroad*, 66 N. Y. 181; *Norton v. Weswell*, 26 Barb. 618; *Bank v. Ward*, 100 U. S. 195; *Loose v. Clute*, 51 N. Y. 494; *Safe Co. v. Ward*, 46 N. J. L. 19; *Nicker v. Harvey*, 49 Mich. 517; *Murray v. Railroad*, 11 Col. 124; *Railroad v. McLaughlin*, 47 Ill. 265; *Hallihan v. Railroad*, 71 Mo. 116; *Gordon v. Livingston*, 12 Mo. App. 267; *Kinealy v. Railroad*, 69 Mo. 666; *Mann v. Railroad*, 86 Mo. 350; *Speed v. Railroad*, 71 Mo. 308. (2) The injury which plaintiff suffered was not proximate to the wrong attributable to the defendant. A voluntary action intervened between the act charged and the injury. The defendant placed the car on its main track; it was thence moved to Pickle's switch by himself or servants and placed on a grade, and from thence put in motion. *Henry v. Railroad*, 76 Mo. 288; *Searle v. Railroad*, 65 Texas, 274; *Lewis v. Railroad*, 54 Mich. 55; *Proctor v. Janings*, 6 Nevada, 424; *Doggett v. Railroad*, 78 N. C. 305; *Wood v. Railroad*, 49 Mich. 370; *Pierson v. Duane*, 4 Wall. 605; *Frances v. Transfer Co.*, 5 Mo. App. 7; *Kisler v. City*, 100 Ind. 210; *Car Co. v. Barker*, 4 Colo. 344; *Scheffer v. Railroad*, 105 U. S. 249; *Cuff Ad. v. Railroad*, 35 N. J. (6 Vroom) 32. (3) The plaintiff's own negligence contributed to the injury of which he complains. (4) The petition fails to state facts sufficient to constitute a cause of action; therefore, the court erred in overruling the defendant's objection to the introduction of any evidence under it and its motion in arrest. (5) The court erred in giving the plaintiff's first instruction, numbered 1. Authorities, *supra*; *Gunly v. Railroad*, 93 Mo. 450; *Brown v. Ins. Co.*, 86 Mo. 51; *Anderson v. McPike*, 86 Mo. 293; *State v. Chambers*, 87 Mo. 404;

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Sykes v. Bollman, 85 Mo. 35. (6) The defendant's second and fourth instructions should not have been given. In them the jury are told that the plaintiff had a right to presume that defendant had done its duty and that the appliances to said car were in such state of repair and condition as to be safely managed and controlled. This was error; there was no duty which the defendant owed to plaintiff by contract, and none by law, except not to wilfully injure him. Authorities, *supra*. (7) The damages are excessive.

Samuel P. Sparks for respondent.

(1) The railway company owed Roddy as the servant of Pickle, its contractee, a legal duty to furnish cars with which to perform his master's work in safety. *Iron Co. v. Erickson*, 39 Mich. 492; *Wood on Master & Serv.*, pp. 910-921, note; *Heaven v. Pender* (1883), 49 L. T. R. N. S. 357; *Easton v. Railroad*, 65 Tex. 577; *Carroll v. Railroad*, 13 Minn. 30; *Horner v. Nicholson*, 56 Mo. 220; *Wright v. Railroad*, 1 Law Rep., Q. B. Div. 252; *Holmes v. Railroad*, Law Rep. 4 Exch. 254; affirmed, 6 Law Rep. Exch. 123; *Shearm. & Red. on Neg.* [3 Ed.] sec. 54a, p. 69. A legal privity exists between one contracting party and the servants of the other when they are exposed to risks arising from some duty or obligation by reason of the contractual relation. *Iron Co. v. Erickson*, 39 Mich. 492; *Whittaker's Smith on Neg.* [1 Am. Ed.] p. 2; *Abraham v. Reynolds*, 5 H. & N. 141. (2) *First*. Negligence in law is a breach of duty unintentionally and proximately producing injury to another possessing equal rights. *Whittaker's Smith on Neg.*, ch. 1, p. 1; *Cooley on Torts* [Ed. 1880] p. 659, ch. 20; *Railroad v. Jones*, 95 U. S. 441; *Thomp. Neg.*, preface. *Second*. Actionable negligence consists in the failure to exercise ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care, by which

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failure the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. *Heaven v. Pender*, *supra*; Bishop, Non. Cont. Law, sec. 436, and note. *Third*. But privity of contract is not always essential to create a liability in the case; it may arise as well out of the relative situation of the parties. *Stewart v. College*, 12 Allen (Mass.) 58; Wood, Master & Serv., p. 912; *Lancaster v. Ins. Co.*, 92 Mo. 460; Whittaker's Smith on Neg., p. 2. (3) The injury complained of was not due to any negligence on the part of Roddy or his master in handling the car with the defective brake after it was furnished by the railway company, but was due wholly to its act in furnishing a car with a defective brake. The company could not shift its responsibility for this default onto Pickle, who was in no way responsible. *Lancaster v. Ins. Co.*, 93 Mo. 460; *Horner v. Nicholson*, 56 Mo. 220. (4) Notwithstanding that Roddy was on the track and handling the property of appellant he did not become its servant thereby, nor was he merely a volunteer; for he was engaged at the moment of the injury in expediting the work of his own master. *Abraham v. Reynolds*, 5 H. & N. 141; *Eason v. Railroad*, *supra*; *Railroad v. Bolton*, 21 Am. & Eng. R. R. Cases (Ohio), 501; *Holmes v. Railroad*, L. R. 4 Exch. 254; 2 Thomp. Neg., sec. 42, p. 1045. (5) The proof was abundant and uncontradicted that the company had been warned of its negligence on former occasions in furnishing cars with brakes out of repair and without any brakes, and that no heed was given to these monitions. Pierce on Railroads, pp. 373-382; Shearm. & Red. Neg., sec. 99; 21 Am. & Eng. R. R. Cases, p. 640. (6) It was not only the duty of the railway company, but it assumed by its contract with Roddy's master, to furnish cars with safe and whole brakes, and the second instruction of plaintiff correctly stated the law in this regard. *Hanna v. Railroad*, 12 S. W. Rep. 719. (7) Appellant's second point that the injury to Roddy was

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not proximate to the wrong attributed to the defendant because a voluntary action, the moving of the car down to the derrick had intervened, finds no support either in the law or the facts in the record of this case, and is not deserving to be dignified by even a passing consideration. *Jucher v. Railroad*, 52 Wis. 150; *Campbell v. City*, 31 Minn. 308; *Railroad v. Dorsey*, 25 Am. & Eng. R. R. Cases (Tex.) 446. (8) This case is clearly distinguishable from that class of actions brought against the owner of premises by an employe of an independent contractor for erections or improvements on the premises with the owner where from the terms of the contract he owes no duty to the employes of the contractor, of which the cases cited under the first proposition of appellant's brief are types. (9) The question of contributory negligence is usually one of fact to be submitted to a jury. *Smith v. Railroad*, 61 Mo. 588; *Longan v. Railroad*, 72 Mo. 392. (10) An employe has a right to assume that the master has done his duty in supplying suitable and safe machinery. *Parsons v. Railroad*, 94 Mo. 286. (11) Where a servant of one company uses the track of another consenting thereto, that company will be held liable for negligence in keeping it in repair as much as it would be for that of its own employe. *Sellars v. Railroad*, 25 Am. & Eng. R. R. Cases, 451. (12) A railroad company permitting another company to use its track is liable to an employe of the latter for damages caused by a failure to keep the track repaired. *Smith v. Railroad*, 19 N. Y. 127; *Sawyer v. Railroad*, 33 Am. & Eng. R. R. Cases (Minn.) 394; *Railroad v. Kilrain*, 4 S. E. Rep. 165. (13) Questions of sufficiency of machinery, employe's ignorance of its dangerous character, failure to inform himself of fact, are all matters within the province of the jury. *McDade v. Railroad*, 26 Am. & Eng. R. R. Cases, 315.

MACFARLANE, J.—This is an action for damages on account of serious personal injuries received by

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plaintiff by reason of alleged negligence on the part of defendant in furnishing a defective car which plaintiff was required to handle.

The petition charges and the evidence shows, that the main line of defendant's road, between St. Louis and Kansas City, passes through the town of Warrensburg, in Johnson county. That about three miles northwest of the town of Warrensburg are extensive stone quarries, owned and operated by one Pickle. Defendant owns and operates a branch railroad running out from Warrensburg to these quarries, which is used for transporting the stone taken from the quarries. From this branch road, at a point near the quarry, was a switch which connected the road with another railroad track, running into the quarry. This latter track was owned by Pickle, and was used for loading stone upon the cars. Cars intended for transportation of coal were brought out on this branch road and were left standing on this quarry track, or convenient thereto, by defendant, and were then handled by Pickle until loaded, when they were carried out by defendant.

Plaintiff at the time of his injury was in the employ of Pickle, working in the quarry, and had been so employed for about thirteen years. At the time of his injury a part of his duty was to load stone into the cars by means of a derrick erected near the quarry and quarry track. After the empty cars had been placed on the quarry track they were managed, controlled and, when necessary, moved to proper position for loading by Pickle and the men in his employ. This duty of moving cars frequently devolved upon plaintiff. The grade to the quarry from the branch road was descending, and brakes were required to hold cars in position.

The plaintiff testified in substance that, on the eighteenth day of June, Antoine Pickle, manager of the quarry, directed him to load a car with stone. Two flat cars stood upon the quarry track, fifty or sixty feet from the derrick. He got upon the north car,

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nearest the derrick, and found the brakes set. He walked on top of the cars to the back end of the south car, and, as he supposed, set the brake tight on that one. He then uncoupled the cars, let the brake off the north one, sat on the end of the other, and with his feet put the north car in motion. He then got down on the ground between the cars, and with his hands, one on the drawhead and the other on the end of the car, commenced pushing the car to the derrick. He had moved but a short distance when the south car struck him, crushing his arm and causing permanent injury. It appeared from other evidence that, while the brake, from what could be seen from the top of the car, and from what could be known from turning it, appeared to be in good condition, it was found that the rod connecting the brakes beneath the car was down, and the brake shoe was, in consequence, too low to touch the wheel, and turning the brakes in the usual way did not set the shoe against the wheel. The brake was, in that condition, wholly useless. When the first car was moved out of the way, the second was set in motion by its own weight, and followed the first on the descending grade, and struck plaintiff as stated.

The evidence showed further that the defect in this brake could have been easily detected by an examination beneath the car. Cars were frequently sent out with defective brakes. Plaintiff testified himself that "half the time they had no brakes on them." Pickle kept chains which were used in making temporary repairs of the brakes, and this one could have been easily repaired with such a chain. The superintendent of the quarry usually examined the cars and notified the employes if any were defective,

The contract between Pickle and the railroad company, if in writing, was not offered in evidence. From the testimony of Pickle, the superintendent, the arrangement between them was that defendant should furnish cars at the quarry when requested. The cars were left

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on the track near the quarry, and were handled at the quarry and loaded by the men employed and paid by Pickle. Defendant had no control over Pickle's men. After the cars were loaded they were billed from the quarry to their destination, and charges for transportation were paid from the quarry. Defendant, when notified, received at the quarry and carried off the loaded cars.

Defendant's answer was a general denial, and plea of contributory negligence. Defendant offered no evidence, and asked no instructions, except in the nature of a demurrer to the evidence, which was refused.

At the request of plaintiff the court gave the jury the following instructions: "1. The court instructs the jury that if you should find and believe from all the evidence in the case that at the time of the injury complained of by plaintiff he was engaged at work in the employment of one Pickle and in his interest, and that defendant had furnished cars to said Pickle to be loaded by him with stone belonging to said Pickle for transportation by the defendant over its road for pay, on or about the eighteenth of June, 1886; that of the cars so furnished by defendant there was one the brake of which needed repairing at the time the same was furnished, and for the want of such repairing was insufficient with proper use and management to fasten, manage and control said car; and that defendant knew of the condition of the brake, or by the exercise of reasonable diligence could have known of its condition; and that plaintiff did not know the condition of said brake until the happening of the injury complained of, and the defect in said brake was not patent to plaintiff or such as would have been disclosed to him had he been ordinarily observant; and that plaintiff while so engaged in the service of said Pickle, loading another of defendant's cars, the car to which was fixed the brake being out of repair ran down and against plaintiff, whereby he was hurt, injured and damaged; and that

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the injury occurred without the fault or negligence of plaintiff contributing thereto, then your findings should be for plaintiff.

"2. The court instructs the jury that if you should find and believe from all the evidence in the case, that the defendant furnished cars to said Pickle to be by him loaded with stone at his quarries for transportation over its railroad, then it became, and was, the duty of the defendant to have furnished cars provided with appliances in such a state of repair as that the said Pickle and his employes could, with proper management and reasonable care and prudence, safely manage and control same while so engaged in said work. And if you should find that plaintiff, before the time of the alleged injury did not know that defendant's cars were not in such condition or repair, he had a right to presume that defendant had done its duty, and that the appliances to said car were in such state of repair and condition as to safely manage and control said cars, with proper use and management, to do the work for which such appliances were designed, and to rely and act upon such presumption."

"4. The court further instructs the jury, if you should find and believe from the evidence in the case that the plaintiff did not know of the alleged condition of the brake referred to in the testimony, until after the happening to him of the injury referred to in testimony, and that the condition of said brake would not have been observed by him by the exercise of ordinary care and reasonable prudence and observation on his part, it was not incumbent on plaintiff to search for and examine for defects in its condition not so observable, but that he had the right to assume that such brake was in a suitable and safe condition as to its being repaired that it would, with proper management, do the work for which it was designed."

The jury found for plaintiff and assessed his damages at \$6,000. Defendant appealed.

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I. The action is for negligence. It is charged in the petition "that it was the duty of said defendant to furnish cars to said Pickle properly constructed, and provided with suitable and safe brakes, properly constructed and sufficiently repaired, and in condition to manage, hold, control and stop its said cars, but plaintiff charges that the said defendant, by its carelessness and negligence failed to furnish cars so properly constructed and with suitable and safe brakes, constructed and sufficiently repaired to manage, hold and control the same."

Definitions of actionable negligence have been given in great variety of forms, by courts and text-writers, but whatever the form of simple definition, there is unanimity of expression and opinion, that it consists in the breach or non-performance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby.

BRETT, M. R., in *Heaven v. Pender*, 17 Rep. 511, defines actionable negligence "to consist in the failure to exercise ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care, by which failure, the plaintiff, without contributory negligence on his part, has suffered injury to his person or property." This definition is cited and approved by counsel for plaintiff, and may be accepted for the purposes of this case.

The question then is, did defendant owe plaintiff the duty of using ordinary care to furnish cars in which to load stone, which were properly constructed and provided with suitable brakes? It is insisted that the duty arose either out of the contract between defendant and Pickle, or by virtue of the relationship between plaintiff and defendant, arising out of their respective duties under the contract.

Assuming that the contract between defendant and Pickle, either expressly, or by implication, imposed upon the former the duty to supply the latter with cars

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provided with suitable brakes, and that there was a breach of that duty whereby plaintiff was injured, does the contract afford him indemnity for his injuries? The right of a third party to maintain an action for injuries resulting from a breach of a contract between two contracting parties, has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England. To hold that such actions could be maintained, would not only lead to endless complications, in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume. *Winterbottom v. Wright*, 10 Mees. & W. 109; *Burdick v. Cheadle*, 26 Ohio St. 393; *Maguire v. Magee*, 13 Atl. Rep. (Penn.) 551; *Necker v. Harvey*, 49 Mich. 518; *Savings Bank v. Ward*, 100 U. S. 195; *Deford v. State*, 30 Md. 195; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Sproul v. Hemmingway*, 14 Pick. 1; *Mann v. Railroad*, 86 Mo. 347; *Lampert v. Gaslight Co.*, 14 Mo. App. 376; *Gordon v. Livingston*, 12 Mo. App. 267.

The rule is put upon two grounds, either of which is unquestionably sound. One ground is given by the court in the opinion in *Winterbottom v. Wright* as follows: "If we were to hold that plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that there is no reason why we should not go fifty." The other ground is thus stated in the New Jersey case above cited: "The object of parties in inserting in their contracts specific undertakings with respect to the work to be done is to create an obligation *inter sese*. These engagements and undertakings must necessarily be subject to modifications and waiver by the contracting parties. If third persons can acquire a right in a contract, in the nature

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of a duty to have it performed as contracted for, the parties will be deprived of control over their own contracts."

Plaintiff not being a party to the contract cannot maintain this action on account of injuries, resulting from any breach of duty defendant owed Pickle, arising purely out of the terms of the contract between them.

II. It is clear from the evidence that plaintiff was in no sense the servant or employe of defendant. He was employed and paid by Pickle and was subject only to his control and direction. Defendant had no authority over him; had no power to discharge him for any cause, and had no contract with him. The relation between plaintiff and defendant was not that of master and servant, and the rules of law peculiarly applicable to the duties and liabilities of one to the other have no application. Plaintiff shows no cause of action growing out of any duty defendant owed him, arising from the relationship of master and servant. Wood on Master and Servant, secs. 1, 281; *Speed v. Railroad*, 71 Mo. 308.

III. There is a class of cases in which one has been held liable to another in the absence of any contractual or other relationship between them. The rule in such cases is laid down in 2 Sutherland on Damages, page 435, as follows: "Where an act of negligence is imminently dangerous to the lives of others, the guilty party is liable to the one injured by the negligence, whether there be a contract between them violated by that negligence or not." The principle is illustrated by the case of *Thomas v. Winchester*, 6 N. Y. 397. That was a case in which a dealer in drugs had carelessly labeled a poison as harmless medicine, and sent it so labeled into the market. It was held that the dealer was liable to any person who might be injured by the use of the drug. In considering what articles can be regarded imminently dangerous, the same court in *Loop v. Litchfield*, 42 N. Y. 357, says: "They are instruments and

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articles in their nature calculated to do injury to mankind, and are generally intended to accomplish that purpose. They are essentially and in their elements instruments of danger." It cannot reasonably be contended that a railroad car, though supplied with defective brakes is an imminently dangerous instrument. Unless put in motion, it is perfectly harmless, and when in motion it is not essentially dangerous. We do not think defendant incurred any liability to plaintiff by the simple act of leaving a defective car upon the track. *Railroad v. McLaughlin*, 47 Ill. 265; *Gurley v. Railroad*, 93 Mo. 445.

IV. What then was the true relationship between these parties, and what, if any, duty did defendant owe to plaintiff as the employe of Pickle?

Defendant was engaged in the general business of a common carrier. It operated a railroad between St. Louis and Kansas City. Pickle was the owner of large and valuable stone quarries, situated some distance from defendant's road. The stone taken from these quarries was merchantable, and was a subject of commerce. The stone was of value only when it could be transported to market. It thus became a matter of mutual interest and profit to defendant and Pickle to provide means for the transportation of this merchandise from the quarry to points at which it could be sold. A contract was entered into between them, by which defendant built a branch or spur road from its main line to the quarries, and also tracks from this spur into the quarries. These were paid for by Pickle. In order to facilitate the transportation of stone, which was beneficial to both parties, it was agreed that defendant should, when cars were needed, place them on the quarry tracks, or conveniently near to them, and that Pickle should move them when needed into position for loading, and when loaded defendant should take them out, and transport them to their destination. Plaintiff was employed by Pickle, a part of his duty consisting in moving and

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handling these cars. It did not appear from the evidence what, if any, compensation Pickle received for loading the cars.

The manner of conducting the business is thus detailed by Pickle, superintendent: "The Missouri Pacific railway built that track on the west side of the quarry; Pickle paid for it. The company claims it; they simply constructed it for Pickle. About shipping stone, the bill reads from Warrensburg of course, but the freight commences from the quarry. The person to whom these cars are sent pays the freight. As to rates, they allowed us a certain amount off from Warrensburg to the quarry; I believe it is \$2.50 or \$5. The freight is included from the quarry, not from town. We don't charter these cars to haul stone to the main line, but charter the cars to wherever the cars are consigned. We don't simply charter the cars to haul the stone from the quarry to Warrensburg. If we have orders to Warrensburg, we bill to Warrensburg. All that the railroad company had to do with the movement of these cars is simply to haul the empties out there, and when we have loaded them the engine comes out and takes them away; that is all they have to do with it. That is not the first car that they sent out there that was out of fix. I have seen as many as ten cars standing there with only two brakes on them."

Under this evidence it is clear that what was to be done by the respective parties, under the contract, was for their mutual profit, and each was a contractor with the other, to perform a particular part of the work necessary to carry out the common purpose. It is now well established that the employer of a contractor is not responsible for the negligence of the contractor, or his servants, in case the contractor is given entire freedom in the use of means to accomplish the result. Where the employer, however, reserves the right to direct the manner of the performance in any particular, or where he undertakes to provide any of the instrumentalities,

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he owes to the contractor and his employes the duty of care in respect to such matters, over which he retains control, or undertakes to perform. Whittaker's Smith on Negligence, 172-174; Wood on Master and Servant, sec. 337; *Stewart v. Harvard College*, 12 Allen, 58; *Lancaster v. Ins. Co.*, 92 Mo. 460; *Horner v. Nicholson*, 56 Mo. 220; *Devlin v. Smith*, 89 N. Y. 470; *Caughtry v. Woolen Co.*, 56 N. Y. 124; *Deford v. State*, 30 Md. 179; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Smith v. Railroad*, 19 N. Y. 127; *Hanna v. Railroad*, 12 S. W. Rep. 718; *Kilian v. Railroad*, 79 Ga. 241; *Conlon v. Railroad*, 15 Am. & Eng. R. R. Cases, 99.

We think each of these contracting parties owed to the other, and his employes, the duty of properly discharging his part of the joint undertaking, in respect to any matter exclusively devolving upon him. Pickle had nothing to do with selecting or providing the cars. That duty was intrusted entirely to defendant. They were intended for the use of Pickle and his servants in discharging his part of the contract, and we think the obligation rested upon defendant to use ordinary care to provide such as would be reasonably safe for such use.

V. The evidence does not show, conclusively, such contributory negligence on the part of the plaintiff as should, as a matter of law, preclude a recovery. Plaintiff in testifying as a witness, it is true, admitted that one-half the cars furnished Pickle by defendant were without brakes. On the other hand Pickle's superintendent testified that he generally examined the cars himself, and if any were found defective, he gave notice of such defects to those who handled them. Whether under these circumstances, and the fact that the brakes appeared, from plaintiff's position on top of the car, and from his efforts to set them, to be in good condition, plaintiff used such precautions as ordinary care and prudence required of him, was a question for the jury.

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It is not every case in which there is no conflict in the facts, that the court will declare, as a matter of law, the legal effect of the evidence. If, upon all the facts and circumstances, there is room for fair and sensible men to differ in their conclusions, the jury should decide. *Petty v. Railroad*, 88 Mo. 306; *Buesching v. Gaslight Co.*, 73 Mo. 219; *Reiley v. Railroad*, 94 Mo. 609; *Thorpe v. Railroad*, 89 Mo. 651; *Wood's Railroad Law*, 1460; *Wood on Master & Servant*, 761.

VI. The instruction, in directing the jury that plaintiff had the right to assume that defendant would furnish Pickle with cars properly supplied with brakes, in good repair and condition, properly declared the law as applied to the duty a master owes to his servant. But if the servant was informed by the master, or had learned by observation, or from any other source, that some of the instrumentalities furnished him were defective and dangerous, and without promise that they would be repaired, he continued in the master's service, then the risk of injury from such defective instrumentalities would become an incident to such service, which he would assume. *Price v. Railroad*, 77 Mo. 508; *Porter v. Railroad*, 71 Mo. 66; *Devitt v. Railroad*, 50 Mo. 302; *Thorpe v. Railroad*, 89 Mo. 650.

While the relation of master and servant did not exist between these parties, defendant owed to plaintiff the observance of reasonable care in the selection of its cars for his use, which is the same degree of care the master is required to observe in providing his servant with the instrumentalities for carrying on his business. No reason can be seen why, if plaintiff knew that defective and dangerous cars were frequently left for his use, he would not assume the risk of injuries from such defects as could have been ascertained by reasonable inspection on his part. While defendant may have been negligent in the discharge of the duties it owed to plaintiff, if plaintiff neglected such precautions as common prudence demanded, under all the circumstances,

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he was guilty of contributory negligence, which should have defeated a recovery.

In view of the fact that plaintiff himself testified that one-half the cars were without brakes, it was not proper to instruct the jury that he had the right to rely on defendant's performance of its duty in furnishing such as were properly supplied with brakes. The knowledge plaintiff had of the common neglect of defendant imposed upon him, for his own protection and safety, the duty of reasonable care in ascertaining for himself the condition of the cars before he attempted to handle them, and a failure to do so would constitute contributory negligence on his part. Whether such care was used on the occasion of his injury should have been submitted to the jury.

For the errors mentioned, the judgment is reversed and cause remanded. All the judges of this division concur.

RODNEY, *Appellant*, v. LANDAU *et al.*

DIVISION ONE.

1. **Vested Remainder.** A vested remainder is a fixed interest to take effect in possession after a particular estate has expired.
2. ——— : **CONTINGENT REMAINDER.** The vested or contingent character of the remainder is determined not by the uncertainty of enjoying the possession but by the uncertainty of the vesting of the estate.
3. ———. The remaindermen are vested ones when they are ascertained, and are to take and enjoy the possession immediately on the death of the life-tenant.
4. **Joint Tenancies: STATUTE.** While joint tenancies are not abolished in this state, still, under General Statutes, 1865, page 443, section 12, to create such a tenancy there must be an express declaration to that effect in the instrument creating the estate.

104	251
110	631
104	251
56a	567
104	251
133	254
104	25
93a	228

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5. **Wills, Recording of: NOTICE : STATUTE.** The question of notice under Revised Statutes of 1879, section 3991, requiring a will devising lands to be recorded in each county in which the land lies, can arise, if at all, only where there are adverse claimants under the same grantor.

Appeal from St. Louis City Circuit Court.

REVERSED AND REMANDED.

Wilson Cramer for appellant.

(1) Plaintiff acquired and holds the interest of James E. Reily whose title passed by descent to his infant daughter, from her to her mother, Julia, who became the wife of plaintiff, and by residuary clause to her will devised the same to plaintiff. *Rodney v. McLaughlin*, 97 Mo. 427. (2) Under the will of their father, James E. and Mary Jane Reily took a vested remainder in fee in the after-acquired property, subject to the life-estate of their mother. *Chew v. Keller*, 100 Mo. 362; *Waddell v. Waddell*, 99 Mo. 338; *De Vaughn v. McLeroy*, 10 S. E. Rep. 211; *Bunting v. Speck*, 21 Pac. Rep. 288; *Watson v. Cressey*, 10 Atl. Rep. 59. They were either tenants in common, or joint tenants. If tenants in common, then, upon the death of his sister, James E. Reily inherited one-half of her share and so owned three-fourths—if joint tenants, he became by survivorship the owner of the whole. (3) James E. and Mary Jane Reily were joint tenants. R. S. 1889, sec. 8916; *Suydam v. Thayer*, 94 Mo. 55. There is such an express declaration in the will as to create a joint tenancy even under General Statutes, 1865, page 443, section 12. (4) The court rightly admitted in evidence the will of Julia Rodney. *Rodney v. McLaughlin*, 97 Mo. 426; *Keith v. Keith*, 97 Mo. 223; *Drake v. Curtis*, 88 Mo. 644. (5) The question of notice can arise only in cases where adverse claimants hold under the same grantor by inconsistent transfers. Such is not the fact

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here. 3 Washb. Real Prop. [3 Ed.] p. 285, sec. 53; *Crockett v. Maguire*, 10 Mo. 34; *McCamant v. Patterson*, 39 Mo. 100; *Aubuchon v. Bender*, 44 Mo. 560; *Railroad v. Moore*, 45 Mo. 443; *Rodney v. McLaughlin*, 97 Mo. 426. (6) Partition sales carry no warranty of title. George Schade, under whom defendants claim, bought subject to the rule of *caveat emptor*. *Stephens v. Ellis*, 65 Mo. 456.

Cecil V. Scott and *H. A. Hauessler* for respondent.

(1) The estate conveyed to Elizabeth C. Reily by the will of James I. Reily, by the one clause of said will, was made a determinable fee by the operation of the clause in said will under consideration. (2) The controlling guide to a court, in construing a will, is to ascertain the intention of the testator, and words used are to be understood in the sense indicated by the whole instrument. *Smith v. Hutchinson*, 61 Mo. 83; *Turner v. Timberlake*, 53 Mo. 371; *Allen v. Chaney*, 63 Mo. 279; *Crecelius v. Horst*, 78 Mo. 566; *Chew v. Keller*, 100 Mo. 362. (3) If the estate devised by the will under consideration to Elizabeth C. Reily should not be considered a determinable fee as suggested, then it incontestably follows that the remainder in James E. and Mary Jane was contingent, and upon their death prior to their mother was vested in her. *Thompson v. Luddington*, 104 Mass. 193; *Emison v. Whittlesey*, 55 Mo. 254; *Aubuchon v. Bender*, 44 Mo. 560; *Olney v. Hull*, 21 Pick. 331; *Delassus v. Gatewood*, 71 Mo. 371, and subsequent cases citing the foregoing too numerous to mention. (4) The court erred in admitting the will of Julia A. Rodney over defendants' objection; said will not having been recorded in the city of St. Louis, where the property in question was situated, was not admissible as foundation of plaintiff's claim. *R. S.* 1879, sec. 3891; *Thornton v. Miskimmon*, 48 Mo. 219; *Youngblood v. Vastine*, 46 Mo. 239; *Kennedy v. Northrup*, 15 Ill. 148; *Keith v. Keith*, 99 Mo. 223; *Graves v.*

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Wait, 99 Mo. 17; *Gaven v. Allen*, 100 Mo. 294. Every interest in real estate granted or devised to two or more persons other than executors and trustees and husband and wife shall be a tenancy in common, unless expressly declared in said grant or devise to be in joint tenancy. R. S. 1879, sec. 3949; 1 Washburn on Real Estate [3 Ed.] 554, and cases cited; *Davis v. Smith*, 4 Harrington (Del.) 68.

BLACK, J.—This is an action of ejectment brought by Charles E. Rodney to recover a parcel of land in St. Louis. Margaret Schade defends for herself and her tenant, Landau. Both sides claim title under James I. Reily who acquired the property by deed dated November 25, 1863.

James I. Reily died in 1865, leaving a will which was executed in 1860 at Cape Girardeau where he then resided. The will was probated at St. Louis in May, 1865, where the testator resided at the time of his death. The property, it will be seen, was acquired by Reily after the date of the will and comes under the clause hereafter mentioned concerning after-acquired property, the construction of which clause presents one of the questions in this case.

The will begins by saying: "I hereby will and bequeath to Elizabeth C. Reily, my wife, all my property, money, stocks, claims, rights in action and effects of every nature whatsoever," and, after appointing her executrix, says "subject to the following bequests." The testator gives directions concerning the education of his two children, and then gives to his son, James E. Reily, two parcels of real estate in the city of Cape Girardeau and six lots in Cairo in the state of Illinois, and to his daughter, Mary Jane Reily, the dwelling-house property in the city of Cape Girardeau, and a named and designated lot in St. Louis. It is then declared: "Provided that, after the decease of their mother, and after Mary Jane shall have attained the age of twenty-one

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years, each of them shall choose a discreet householder of the city of Cape Girardeau, whose duty it shall be to select another man of judgment and discretion, which three persons shall proceed to value all the property herein willed to James E. Reily and Mary Jane Reily, separately, and under a statement in writing of such valuation, which shall be binding, if signed by them or a majority of them; such valuation of each one's part shall be so applied, as to divide the balance of the estate equally between them, considering the property hereinbefore bequeathed as part of the whole estate. The Concannon shop lot, or any other property herein not bequeathed, or hereafter acquired by me, shall belong to my wife, Elizabeth C. Reily, during her lifetime, and afterward be joint property, transferable by joint deed of James E. and Mary Jane Reily, or either of them may sell their interest in such property after the decease of their mother, and Mary Jane attains the age of twenty-one years."

Mary Jane Reily died in April, 1870, intestate and without issue, leaving her mother and brother surviving her. James E. Reily died in December, 1870, intestate as to the property in question, leaving a widow, Julia Reily, and an infant daughter named Mary Jane. This infant daughter died in April, 1871, leaving her mother, Julia Reily, as her sole heir. Julia Reily thereafter married the plaintiff, Charles E. Rodney. She died in 1876, leaving a will with a residuary clause in favor of the plaintiff, by virtue of which he claims the property in suit.

The defendants claim title under Elizabeth C. Reily, the widow of James I. Reily. She died in 1879, subsequent to all of the before-mentioned dates, leaving a will whereby she devised the property in question to Edward S. Lilley. Partition proceedings were had between persons claiming under Elizabeth C. Reily and Edward S. Lilley, which resulted in the sale of the property to George Schade in November, 1881. The defendant,

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Margaret Schade, is the devisee of George Schade. The plaintiff, Charles E. Rodney, was not made a party to the partition proceedings, nor were the heirs of Julia Rodney.

That part of the will of James I. Reily which relates directly to the property in question provides that "any other property * * * hereafter acquired by me shall belong to my wife, Elizabeth C. Reily, during her lifetime, and afterward be joint property, transferable by joint deed of James E. and Mary Jane Reily, or either of them may sell their interest in such property after the decease of their mother, and Mary Jane attains the age of twenty-one years."

As has been said, James E. Reily survived his sister, and the mother survived him. If he had no title to any part of the premises when he died, then the plaintiff cannot recover. The defendants insist that he had no interest and assign two reasons therefor: *First*, that Elizabeth C. Reily took a fee, subject only to the condition that if James E. and Mary Jane survived her, then her estate would cease; *second*, that James E. and Mary Jane at most had only a contingent remainder which never vested.

We do not see upon what possible grounds the first of these propositions can be sustained. It is by no means clear that Mrs. Elizabeth C. had anything more than a life-estate in any of the property. It is true that the testator begins by saying he bequeaths to his wife "all" of his property, moneys, etc.; but this is immediately followed by the words, "subject to the following bequests." After giving to the children certain specified property, he provides that the property so given to them shall "after the decease of their mother, and after Mary Jane shall attain the age of twenty-one," be valued separately, and the value of each one's part shall be so applied, as to divide the balance of the estate equally between them "considering the property hereinbefore bequeathed as part of the

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whole estate." The words last quoted seem to embrace the property before devised and bequeathed to Elizabeth C., and, since it is that property which is to be divided after her death, it may well be concluded that she took but a life-estate. If she had but a life-estate in the property first given to her, then there is no foundation whatever for the claim that she took more than a life-estate in the after-acquired property. But be all this as it may, the gift to the wife made in the first part of the will is comprehensive enough to cover all of the property of the testator, and is made "subject to the following bequests." This gift to the wife in such general and comprehensive terms must, therefore, yield to any and all subsequent provisions of the will; for that is the clearly declared intention of the testator. When we come to the after-acquired property there is no room for doubt, for he gives to his wife a life-estate only and that too in clear and unmistakable terms.

The next question is whether the children took a vested or contingent remainder in this after-acquired property. This subject of vested and contingent remainders has been considered in two recent cases in this court, *Waddell v. Waddell*, 99 Mo. 342, and *Chew v. Keller*, 100 Mo. 366. They show that a vested remainder is a fixed interest to take effect in possession after a particular estate is spent. The vested or contingent character of a remainder is determined, not by the uncertainty of enjoying the possession, but by the uncertainty of the vesting of the estate. In the early case of *Jones v. Waters*, 17 Mo. 589, the testator devised the property to his wife "for and during her natural life, and after her death to descend to her children by me, equally, share and share alike." The will in that case, it was held, created a vested remainder in the children, because the devisees in remainder were ascertained by the will, and were to enjoy the estate as soon as the estate for life ended. Had the will in that case

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said, "and after her death to descend to her children by me, *living at her death*," the remainder would have been contingent, because no one could tell whether any of the children would survive the mother. It was because of this uncertainty as to the persons who were to take in remainder that the remainder was held to be contingent in each of the following cases cited and relied upon by the defendant: *Aubuchon v. Bender*, 44 Mo. 560; *Emison v. Whittlesey*, 55 Mo. 254; *DeLasus v. Gatewood*, 71 Mo. 372. In the case in hand the devisees in remainder are pointed out by the will itself, and there is no contingency whatever in that respect, so that the cases just mentioned do not in the least support the claim of the defendants in this case.

The word "afterward," used by the testator, simply denotes the time when the devisees in remainder shall have possession and full enjoyment of the property, and does not create a contingency. Enough was said upon this subject in *Chew v. Keller*, *supra*. It is also true that the testator goes on to say when the devisees in remainder may sell, and it may be conceded that he intended they should not dispose of their interests in the property until the death of the life-tenant and Mary Jane arrived at the age of twenty-one. But these are limitations on the power of disposition and have nothing to do with the vesting of the estate. In *De Vaughn v. McLeroy*, 10 S. E. Rep. 211, the testator gave his wife \$3,000, and directed his executors to invest the same in a settlement of land for her. He then devised the land so to be purchased to his wife, for life, and made it the duty of the executors to manage the property for her, and after her death to sell the land and divide the proceeds between his children. It was held the children took a vested remainder in the property so purchased, and that the directions to sell the land upon the death of the life-tenant did not make the estate of the children a contingent remainder.

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Now in this case the devisees in remainder are ascertained, and they are to take possession and enjoy the estate immediately upon the death of the life-tenant, and that they took a vested remainder we have no doubt whatever. The circuit court, therefore, erred in holding that upon the death of James E. and Mary Jane Reily the property became the absolute estate in fee of Elizabeth C. Reily.

The next question is whether these remaindermen were tenants in common or joint tenants. According to the statute an interest in real estate granted or devised to two or more persons, not executors, trustees or husband and wife, is a tenancy in common, "unless expressly declared, in such grant or devise, to be joint tenancy." R. S. 1865, sec. 12, p. 443. Now, while the testator speaks of this property as their "joint property" transferable by "joint" deed, still there is no express declaration that it is to be held by them in joint tenancy. It is quite common to speak of property as joint property when nothing more is meant than ownership of the same property by different persons. The policy of the American law is opposed to survivorship, and that policy is clearly indicated in our statutes. While joint tenancies are not abolished in this state, still to create such a tenancy there must be an express declaration to that effect in the deed or will creating the estate, and that is not done by the will of James I. Reily. *Purdy v. Purdy*, 3 Md. Ch. 547, is in point and to the same effect.

As these children took a vested remainder as tenants in common, it follows that at the death of Mary Jane Reily her undivided half passed to her mother, Elizabeth C., and brother, James E., in equal parts, thus giving Elizabeth C. Reily the undivided one-fourth. This interest the defendant acquired under the partition sale. The three-fourths interest held by James E. Reily passed to his infant daughter, and at her death to her

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mother who became Julia Rodney, who devised the same to the plaintiff.

But the defendants insist that the exemplification of the record of this will of Julia Rodney should have been excluded, because not recorded in St. Louis within six months after the probate thereof. The will bears date September 6, 1876, and was duly probated in Cape Girardeau county on October 20, of the same year, that county being the residence of the testatrix; but a copy of the will was not recorded in St. Louis until the twenty-eighth of November, 1885, a few days after the commencement of this suit. Where, as here, a will is duly probated in one county in this state, a certified copy of the record of the same and the probate thereof may be read in evidence in the courts of any other county. But section 3991 of Revised Statutes, 1879, provides in substance that where lands are devised, a copy of the will shall be recorded in the recorder's office in the county where the land is situate, and, if the lands are situate in different counties, then a copy of such will shall be recorded in the recorder's office in each county within six months after probate.

This section was first enacted in 1870, and it does not provide what the effect of a failure to record the will in the recorder's office shall be. Counsel for the defendants insist that the object of the statute was to give notice of the will to persons dealing with the property, that it "was intended to prevent just such results as plaintiff here contends for; that is, by virtue of an unrecorded will he can come here and take this property from *bona fide* innocent purchasers for value under a partition sale had among the heirs at law at the date thereof." For all the purposes of this case, but without so holding, let it be conceded that persons dealing with the land will not be charged with constructive notice of the will, unless it is recorded in the recorder's office of the county where the land is situated; still all this does not benefit the defendants in the least. In the

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first place defendants are not claiming this land under partition proceedings to which the heirs of Julia Rodney were parties. She held the title to three-fourths of this property, and she died long before the partition proceedings were commenced, and her heirs were not made parties to those proceedings. The defendants acquired and by their title papers claim to have acquired nothing from or under her or her heirs. The question of notice can only arise when there are adverse claimants under the same grantor, and there is no such conflict of title in this case. If Julia Rodney had died intestate, her interest in the property would have passed to her father, mother, brothers and sisters, and not to Elizabeth C. Reily, or to any other person or persons through whom the defendants claim. The failure to record the will of Julia Reily does not affect the defendant's title. Give to the statute in question all the force and effect that is claimed for it by the defendants, or that can possibly be claimed for it, still the probated will of Julia Reily is good as a transfer of title as between her devisee and all persons not claiming under her heirs at law. *Rodney v. McLaughlin*, 97 Mo. 426.

The judgment is, therefore, reversed and the cause remanded. BAROLAY, J., not sitting; the other judges concur.

THE PRESIDENT AND FACULTY OF ST. VINCENT'S COLLEGE, *Appellant*, v. SCHAEFER, *Collector*.

DIVISION ONE.

1. **Constitution : EXEMPTION FROM TAXATION : STATUTE.** Under the state constitution, as it existed in 1853, the legislature could exempt the property of a college "from the payment of taxes for state or county purposes so long as the same or the proceeds thereof shall be used for or applied to educational purposes." (Acts, 1853, p. 569.)

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2. **Contract: EXEMPTION FROM TAXATION: CONSTITUTION.** Such exemption constitutes a contract on the part of the state which, in the absence of a reserved right to do so, it cannot abrogate.
3. ——— : ——— : **CONSIDERATION.** The benefit which the legislature deemed the state would derive from the passage of the act constituted a sufficient consideration for the contract, and no other is required to support it.
4. ——— : ——— : **VARIANCE IN NAMES.** An immaterial variance between the name of the corporation in the law creating it and the name as used in the act of exemption from taxation will not affect the validity of the latter act.

Appeal from Cape Girardeau Circuit Court.—HON.
H. C. O'BRYAN, Judge.

REVERSED AND REMANDED.

John H. Nicholson for appellant.

(1) The special act of 1853 (Session Acts, 1853, p. 569) exempting appellant's property from taxation, and the acceptance of said act, and the compliance with its terms and conditions by appellant, as fully set forth in appellant's petition, constitute a contract with the state of Missouri, within the meaning of section 10, article 1, of the constitution of the United States. Therefore, the state of Missouri had no power to repeal, either expressly or by implication, said special act of exemption. Cooley's Const. Lim. [3 Ed.] star pages 280, 281; *Bank v. Kansas City*, 73 Mo. 555. It is not necessary that there should be a benefit or advantage to the promisor; inconvenience, trouble, expense to the promisee will make the consideration valuable. *Block v. Elliott*, 1 Mo. 275; *Halsa v. Halsa*, 8 Mo. 303; *Mullanphy v. Reilly*, 8 Mo. 675; *Hudson v. Busby*, 48 Mo. 35. (2) The special act of 1853, exempting appellant's property from taxation, was not impliedly repealed, as held by the court below, either by the constitution of 1865 or that of 1875, or by the general laws on taxation of either of those two years. *First.* The

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court in *State ex rel. v. Huys*, 52 Mo. 578, page 580, says: "That the rule is well settled that statutes are not to be construed as having a retrospective effect, unless the intention of the legislature is clearly expressed that they should so operate, and unless the language employed admits of no other construction." To the same effect see *Railroad v. Cass Co.*, 53 Mo. 17, p. 28; *Smith v. Clark Co.*, 54 Mo. 58; *St. Louis v. Ins. Co.*, 47 Mo. 146. *Second.* It is fair to presume that if the legislature intends to repeal a statute, they will do so in express terms, or by the use of words which are equivalent to an express repeal. *State ex rel. v. Macon Co.*, 41 Mo. 453, 459. *Third.* The same canons of construction apply to constitutions as to statutes in the matter of repeals. *State ex rel. v. Macon Co.*, 41 Mo. 453. Cooley on Const. Lim. [3 Ed.] star page 62. *Fourth.* The constitution of 1865, section 16, article 11, was designed to be prospective and not retrospective in its operation, and it did not operate to disturb existing exemptions from taxations, made by the legislature. *Scotland Co. v. Railroad*, 65 Mo. 123; *State ex rel. v. Cem. Ass'n*, 11 Mo. App. 570; *State ex rel. v. Macon Co.*, 41 Mo. 453; *State ex rel. v. Court*, 51 Mo. 522; *State v. Grant*, 79 Mo. 113; *State ex rel. v. Greer*, 78 Mo. 188. *State ex rel. v. Schooley*, 84 Mo. 447. *Fifth.* *Assumpsit* for money had and received is an appropriate remedy to recover back money illegally exacted by the collector as taxes in all jurisdictions where no other remedy is given, unless the tax was voluntarily paid, or some statutory conditions are annexed to the exercise of the right to sue which were unknown at common law. *Cox v. Collector*, 6 Meyer's Fed. Dec., sec. 1431. *Sixth.* The petition of appellant shows that the taxes sought to be recovered back were paid to defendant under protest only when the collector had levied on the property of appellant for said tax, and it was to release said levy and prevent the threatened sale of said property that appellant paid said tax. *Seventh.* Usually preventative

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remedies are discountenanced as embarrassing to the just operation of the government, and a party is required to pay the tax, and seek redress in an action of *assumpsit* against the collector for money had and received. *Trade Co. v. Collector*, 6 Meyer's Fed. Dec., sec. 1435; *Wolf v. Marshall*, 52 Mo. 167; *Maguire v. Sav. Ass'n*, 62 Mo. 344; *Westlake v. City*, 77 Mo. 47.

Edward Robb also for appellant.

(1) Even if there was a misnomer of the corporation in the exemption act, it is unimportant. The identity of the corporation can be ascertained, and it is clearly indicated by the act. 1 Morawetz on Corporations, secs. 354, 355; *Ins. Co. v. Davenport*, 57 Mo. 239; *Schaeffer v. Brewery Co.*, 4 Mo. App. 115; *Haskell v. Selle*, 14 Mo. App. 91. (2) The special act of exemption created an irrevocable contract between the state and appellant. *Railroad v. Maguire*, 20 Wall. 136; *Bank v. Knoop*, 16 How. 369; *Home, etc., v. Rouse*, 8 Wall. 430; *Scotland Co. v. Railroad*, 65 Mo. 123. (3) The special act of exemption was not repealed by the constitutional provisions. Repeals by implication are not favored. *Railroad v. Maguire*, 53 Mo. 17; *Macon Co. Case*, 41 Mo. 453; *St. Louis v. Alexander*, 23 Mo. 482; *Smith v. Clark*, 54 Mo. 58; *St. Louis v. Ins. Co.*, 47 Mo. 147; *State v. Greer*, 78 Mo. 183; *State v. Grant*, 79 Mo. 113.

Wilson Cramer and *J. A. Snider* for respondent.

(1) There was a fatal misnomer and variance between the true legal name of the corporation, viz., "The President and Faculty of St. Vincent's College," and the designation of "St. Vincent's College," in the act of exemption. Laws, 1853, p. 569; 75 Mo. 382; 14 Mo. App. 91; 13 Mo. App. 579; 11 Mass. 138; 58 Ga. 280. (2) The property was not exempt from taxation

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as claimed by plaintiff. Const. 1865, art. 11, sec. 16; G. S. 1865, p. 95, sec. 2; Const. 1875, art. 10, sec. 6; Acts, 1883, p. 140. The exemption act of 1853 and the constitution of 1875 are irreconcilably inconsistent and cannot stand together, and the former is repealed by the latter. *Railroad v. Cass Co.*, 53 Mo. 17; *State v. Macon Co.*, 41 Mo. 453; *Fountain v. Everett*, 52 Mo. 57; *State ex rel. v. Draper*, 47 Mo. 29. (3) The alleged contract in the exemption was without consideration to support it. *Hudson v. Busby*, 48 Mo. 35.

BLACK, J.—This is a suit to recover \$159.87 on account of taxes paid by the plaintiff to defendant as collector of Cape Girardeau county, the taxes having been paid under written protest. The circuit court sustained a demurrer to the petition, and from a judgment thereon plaintiff appealed.

The legislature, by the act of February 27, 1853, constituted certain persons and their associates a body corporate by the name of "The President and Faculty of St. Vincent's College." The act gives to the corporation the right to acquire real and personal property by purchase, gift or devise; provided, that the clear yearly value of the real estate shall not exceed the sum of \$10,000. The institution is to be established in the city of Cape Girardeau, and, when so established, has conferred upon it all the rights and privileges given by an act incorporating St. Mary's College, in the county of Perry. Acts of 1842 & 3, p. 237.

The act of February 9, 1853, entitled, "An act to exempt certain property from taxation," provides:

"*First.* All the real estate and appurtenances now belonging to the St. Vincent College and St. Vincent Female Academy, in the county of Cape Girardeau, or held by any other person in trust for the use of said college or academy, be and the same is hereby exempt from the payment of taxes for state or county purposes,

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so long as the same, or the proceeds thereof, shall be used for or applied to educational purposes.

"*Second.* That six hundred and forty acres of land, and appurtenances, upon which St. Mary's seminary now stands, in Perry county, Missouri, be and the same is hereby exempt from the payment of taxes for state or county purposes, so long as the same shall be used and occupied as a seminary of learning.

"*Third.* That nothing contained in this act shall be so construed as to exempt from the payment of city taxes any property of the said college or academy that may be situated in the city of Cape Girardeau." Acts of 1853, p. 569.

The petition sets out these acts and it is then alleged that plaintiff was duly organized under the first act; that prior to the passage of the last act it owned certain real estate, and also certain lots in the city of Cape Girardeau; that the institution was located upon part of said lots; that plaintiff duly accepted the last-mentioned act and has complied with all of its terms and provisions; that the land and lots were assessed and taxes levied thereon for state and county purposes for the year 1886, in the sum of \$159.87; that to pay the taxes so assessed the defendant as collector seized certain personal property of the plaintiff and was about to sell the same, when the plaintiff paid the taxes under written protest setting forth its right of exemption.

It is insisted, on the part of the plaintiff, that the provisions of the constitution of 1875, and section 6359, of the Revised Statutes, 1879 are prospective only in their operation, and are not in conflict with, and, therefore, do not repeal, the exemption contained in the above act of February 9, 1853; but for all the purposes of this case we shall assume that the present constitution and statutes are inconsistent with the exemption contained in that act, and that the exemption in favor of the plaintiff has been repealed, if the state had the power to repeal it.

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The language of the act of 1853 is clear and free from ambiguity. It exempts the real and personal property then belonging to St. Vincent's College "from the payment of taxes for state or county purposes, so long as the same or the proceeds thereof, shall be used for or applied to educational purposes." There can be no doubt but the legislature had the power to pass the law, for such legislation was not then prohibited by any constitutional provision; nor is it claimed by the defendant that the state reserved the right to repeal the exemption.

Acts like the one in question, exempting corporations from taxation, constitute contracts, and the state has no power to impair the obligations of such contracts, unless that right is reserved. The right of the legislature, unrestrained by constitutional prohibitions, to grant irrevocable exemptions from taxation is no longer an open question. *Mechanics' Bank v. City of Kansas*, 73 Mo. 555, and cases cited; *Cooley on Const. Lim.* [5 Ed.] 340; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Washington University v. Rouse*, 8 Wall. 439. In the case cited from 8 Wall. 430, the legislature of this state had created a corporation for the purpose of enabling female persons to establish a charitable institution for the relief of destitute and suffering females, and the act declared that all the property of the corporation should be exempt from taxation. It was held that the charter constituted a contract between the state and the incorporators, and that the state could not tax the property of the corporation.

In answer to the objection made in that case, that there was no consideration expressed in the act, the court said: "There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created. These objects were deemed by the legislature to be beneficial to the community, and this benefit constitutes the

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consideration for the contract, and no other is required to support it."

These observations meet like objections made in the present case. The legislature deemed the benefit to be derived from the application of the proceeds of the lands to educational purposes a good and sufficient consideration for the exemption. This act of 1853, therefore, amounts to a contract, and we must hold in conformity with the cases cited that the legislature had the right to, and did, contract away the power of the state to tax the property of this corporation; for the demurrer admits that the plaintiff has and does continue to use the proceeds of the lands for educational purposes. The lands and lots were, therefore, exempt from taxation for state and county purposes.

It is insisted that the act of 1853 does not confer the immunity from taxation upon the plaintiff, because the plaintiff is not named therein. The original act of 1843 is entitled, "An act incorporating St. Vincent College," while in the body of the act the institution is incorporated by the name of "The President and Faculty of St. Vincent's College;" and the exempting act speaks of all real estate, etc., belonging to the "St. Vincent College." The objection is too technical to deserve much consideration; for there can be no doubt but the last act refers to the corporation created by the first one. The title of the first act is quite conclusive. The variance is immaterial, for the two names are substantially the same. *International Ins. Co. v. Davenport* 57 Mo. 289.

The objections to the petition are, therefore, not well taken, and the judgment is reversed and the cause remanded. The other judges concur.

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THE STATE V. BAKER, *Appellant*.

DIVISION TWO.

Assault with Intent to Kill: REVIEW OF CONVICTION. Where there is no error in the instructions and the verdict is supported by the evidence a conviction of an assault with intent to kill will be affirmed.

Appeal from Andrew Circuit Court.—HON. C. A. ANTHONY, Judge.

AFFIRMED.

William Heren and T. H. Ensor for appellant.

John M. Wood, Attorney General, for the State.

THOMAS, J.—Defendant was indicted in the circuit court of Andrew county for an assault on Daniel Graham with intent to kill, for which he was tried in December, 1887, was found guilty, and sentenced to pay a fine of \$100. He appeals.

The evidence shows that defendant shot at Graham with a pistol in a store in Helena, in Andrew county, about the thirtieth day of October, 1886, but missed him. Defendant admits shooting at Graham, but says he acted in self-defense. There was a conflict of evidence as is usual in such cases, as to the issue of self-defense.

We have examined the record, and we find the instructions given to the jury by the court on the issues of an intent to kill, self-defense, the credibility of witnesses, the weight to be given to the testimony of defendant and reasonable doubt and the burden of proof couched in language often sanctioned by this

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court. The verdict was authorized by the instructions and supported by the evidence, and we do not feel that it is our province to interfere with the result. The judgment will be affirmed. All of this division concur.

 ELLIS, *Appellant*, v. HARRISON *et al.*, *Appellants*.

 DIVISION ONE.

1. **Parties : CONTRACT FOR BENEFIT OF THIRD PERSON.** A person for whose benefit an express promise is made in a valid contract between others may in this state maintain an action thereon in his own name.
2. ——— : ———. The beneficiary of such a contract does not acquire a better standing to enforce it than that of a contracting party.
3. **Partnership Agreement : PAROL EVIDENCE.** Where partnership articles provided that a firm should assume the "mercantile debts" of the then jobbing business of one of the partners, oral evidence was admissible of contemporaneous acts and declarations of the parties and of the opening entries in their firm books to prove the sense in which those terms were used.
4. **Written Contract : AMBIGUITY : EVIDENCE.** Where language of a written contract is ambiguous, the mutual construction given it by the parties is admissible to show their meaning.
5. ——— : INTERPRETATION : INTENTION. The object of interpretation of instruments should be to reach the actual intention of the parties.
6. **Practice : ISSUE OF FACT OR LAW : WAIVER.** When a party by instructions has submitted an issue to the trial court as one of fact, he cannot, on appeal, maintain that it should have been treated as an issue of law.
7. **Constitution : JURISDICTION OF SUPREME COURT.** In a case where one judgment embodies a finding against plaintiff as to three counts of the petition, involving more than \$2,500, and against defendant as to the fourth count, involving less than that sum, both parties appealing, the supreme court has jurisdiction to determine both appeals under the constitution of Missouri, article 6, section 12.

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8. **Attachment: ACCEPTOR OF BILL OF EXCHANGE BEFORE MATURITY.**
The acceptor of a bill of exchange for accommodation of the drawer cannot, under Revised Statutes, 1889, section 523, maintain an attachment against the latter before maturity of the paper and before any payment on account thereof.

Appeal from Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED AND REMANDED.

THOMAS ELLIS, SR., is plaintiff and W. P. Harrison and Thomas Ellis, Jr., are defendants in the action.

Plaintiff presents four demands stated separately. In his petition they appear thus:

First count, for \$3,900, and interest, represented by notes.

Second count, upon one note for \$3,338.73, and interest.

Third count, upon one note for \$800, and interest.

Fourth count, for money laid out and expended for the use of defendants.

The notes on which the first three counts depend were all signed by Thomas Ellis, Jr., to the order of plaintiff, and the liability of the present defendants for them is alleged to arise out of the following facts. Mr. Ellis, Sr., and Mr. Ellis, Jr., his son, had a place of business at Kansas City, Missouri, as partners, under the style of Thomas Ellis & Co., in the tobacco trade, prior to November 14, 1884, at which date that firm dissolved. By the terms of dissolution Mr. Ellis, Sr., sold his interest in the partnership effects, etc., to Mr. Ellis, Jr., who took the assets and proceeded with the business under the same name as that of the late firm. Mr. Ellis, Jr., did not pay cash for his father's interest thus acquired, but gave his notes (at several months' time) therefor. Those are the notes on which the first three counts of the petition are based. After plaintiff received them from Mr. Ellis, Jr., the maker, the latter formed a

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partnership under the style of Harrison & Ellis, February 1, 1885, with W. P. Harrison, his codefendant now. It is claimed that the latter is liable for these notes, by virtue of the contract creating the partnership of Harrison & Ellis.

By its terms it was, among other things, agreed that, in opening the books of Harrison & Ellis, "the mercantile debts of the said present jobbing business of the said Thomas Ellis, Jr., shall be assumed by the firm of Harrison & Ellis."

Plaintiff asserts that by reason of this stipulation between Mr. Ellis, Jr., and his codefendant, Mr. Harrison, the latter became bound to plaintiff for the said notes of Mr. Ellis, Jr., given in November, 1884, to acquire the interest of Mr. Ellis, Sr., the plaintiff in the old firm of Thomas Ellis & Co., because the notes so given constituted "mercantile debts" of the said "jobbing business," at the time Mr. Harrison came in, February 1, 1885. Defendant denies this contention.

The first three counts of the petition and the answer denying them raise the issue above indicated.

The fourth count is predicated upon an acceptance by plaintiff of a bill of exchange, drawn by the defendants, April 14, 1885, for their accommodation, upon which the firm of Harrison & Ellis realized the proceeds before maturity. It appears that plaintiff was obliged to pay this draft at maturity in the sum of \$360, to the use of defendants in consequence of his said acceptance, but after this action was begun.

The allegations in this count were also denied by defendant. The cause was tried by the court without a jury. The result was a finding for one defendant, Mr. Harrison, on each of the first three causes of action. Mr. Ellis, Jr., made no defense, and hence findings were entered against him for the sums claimed in the three counts mentioned.

On the fourth count the court found for plaintiff against both defendants to the amount of \$411.66 (including interest).

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After judgment accordingly and the necessary motions and exceptions by plaintiff and Mr. Harrison, both of them appealed to the supreme court. The other material facts will appear in the course of the opinion.

Frank Titus for appellant, *Thomas Ellis, Sr.*

(1) The trial court erred in overruling plaintiff's motion, requesting the sustaining of the attachment prior to going to trial on the merits. *Green v. Craig*, 47 Mo. 90; *Cannon v. McManus*, 17 Mo. 345; *Hatry v. Shuman*, 13 Mo. 547. (2) The court erred in admitting illegal evidence in behalf of defendant Harrison. Parol testimony will not be permitted to vary or change such partnership contract as against plaintiff. *Carpenter v. Jamison*, 75 Mo. 285; *Jennings v. Brizadine*, 44 Mo. 335; *Bond v. Worley*, 26 Mo. 253; *Lone v. Price*, 5 Mo. 101; *Tracy v. Iron Works*, 29 Mo. App. 342; *Burges v. Badger*, 124 Ill. 288; *Langell v. Langell*, 17 Oregon, 220-229; *Adair v. Adair*, 5 Mich. 204; 71 Am. Dec. 779; *Melton v. Watkins*, 24 Ala. 433; *Cargill v. Corby*, 15 Mo. 425; *Everett v. Chapman*, 6 Conn. 347; *Coffing v. Taylor*, 16 Ill. 457; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 273; *Martin v. Hamlin*, 18 Mich. 364; *Selden v. Myers*, 20 How. 506; *Henderson v. Mayhew*, 2 Gill. 393; 1 Greenl. Ev. [14 Ed.] sec. 275. Under the pleadings and evidence plaintiff was entitled to recover against Harrison on all the counts in his petition. As to the first three counts, defendant's liability rests upon the stipulations in his partnership agreement for plaintiff's benefit, and his acts thereunder and the plaintiff's acquiescence therein. The defendant is absolutely bound. *Rogers v. Gosnell*, 58 Mo. 589; *Cress v. Blodgett*, 64 Mo. 449, 452; *Burton v. Larkin*, 36 Kan. 246; *Shamp v. Meyer*, 20 Neb. 223; *McAdaras v. King*, 10 Mo. App. 578; *Tournade v. Methfessel*, 3 Hun, 144; *Fitzgerald v. Barker*, 85 Mo. 13; *State ex rel.*

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v. Potter, 63 Mo. 212. The admission into a firm of a new partner is a sufficient consideration for his assumption of existing debts. *Jones v. Bartlett*, 50 Wis. 589; *Shaw v. McGregor*, 105 Mass. 96; 1 Addison on Contracts [3 Am. Ed.] sec. 109. (5) Much slighter testimony than that of plaintiff in this case is sufficient to prove an assumption by an incoming partner of prior existing debts. *Cross v. Bank*, 17 Kan. 336; *Wheat v. Hamilton*, 53 Ind. 256; *Register v. Dodge*, 61 How. Pr. 107; *Rolfe v. Flower*, L. R. 1 P. C. 27; *Ex Parte Jackson*, 1 Vesey, Jr. 131; Lindley on Partnerships [4 Ed.] p. 392. (6) While the partnership books are evidence against the partners, any discrepancies, irregularities or omissions therein are not competent as evidence to weaken or discredit the plaintiff's claim. *Shackelford v. Shackelford*, 32 Gratt. 481, 507; 2 Lindley on Part. [2 Am. Ed. Ewell] p. 537. (7) The phrase "mercantile debts" used in the partnership contract of defendants properly embraced the debts owing to plaintiff and sued on in this action. *Jones v. Bartlett*, 50 Wis. 589. (8) There is no ambiguity in the partnership agreement of defendants, and it was the duty of the court to properly construe it. *Pearson v. Carson*, 69 Mo. 550; *Fruin v. Railroad*, 89 Mo. 397.

Henry N. Ess and Gage, Ladd & Small for appellant, W. P. Harrison.

Error was committed by the court below upon this branch of the case as follows: *First*. The objection to the introduction of any testimony under the fourth count of the petition should have been sustained. *Second*. Plaintiff's fourth declaration of law should have been refused. *Third*. The declaration asked by defendant Harrison that there could be no recovery on the fourth count should have been given. *Fourth*. Under the pleadings and evidence the finding and judgment should have been for the defendants. There was

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no evidence to sustain the finding and judgment. The plaintiff accepted the draft in question for the accommodation of the defendants. He was, therefore, surety for them. The draft was dated April 14, 1885, was payable sixty days after its date, and matured June 16. The petition alleges that it was paid on or about June 14, 1885. The suit was commenced May 4, 1885. At that time the defendants were not the debtors of the plaintiff, nor did they become so until his payment of the draft. They owed him nothing due, or to become due. The surety's right of action only arises upon his payment of the debt. Until then he can do nothing and a right of action must be complete at the time the suit is commenced. The subsequent acquisition of the right—as in this case, by the payment of the draft pending suit—will not enable him to maintain an action brought before the right accrued. Until the plaintiff had paid this draft, no one possessed a right of action against the defendants on it, or on account of it, except the holder thereof, whoever he might be. *Hearne v. Keath*, 63 Mo. 84; *Dennison v. Soper*, 33 Iowa, 183; *Read v. Ware*, 2 La. Ann. 498; *Price v. Merritt*, 13 La. Ann. 526; *Todd v. Shouse*, 14 La. Ann. 428; *Black v. Zacharie*, 3 How. (U. S.) 483; *Benson v. Campbell*, 6 Porter (Ala.) 455; *Drake on Attachment* [6 Ed.] secs. 27a, 28, and cases cited; *Brandt on Suretyship*, sec. 176.

Gage, Ladd & Small, for W. P. Harrison, respondent.

(1) All of the plaintiff's declarations of law were given, but the court found the facts against him. It found that the debts sued for were not "mercantile debts of the present jobbing business of Thomas Ellis, Jr.," and, under the rules of practice in this court, that finding will not be disturbed. *Meyer v. McCabe*, 73 Mo. 236; *Fulkerson v. Mitchell*, 82 Mo. 13; *Handlan v.*

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McManus, 100 Mo. 124. (2) The written statement number 3 was a contemporaneous writing relating to the subject-matter of the written contract, and was admissible in evidence upon that ground. *Liebke v. Methudy*, 14 Mo. App. 65; s. c., 18 Mo. App. 143. (3) Evidence of the circumstances under which a contract was made and the relations of the parties is admissible to aid in the ascertainment of its meaning. *Lash v. Parlin*, 78 Mo. 391; *Edwards v. Smith's Adm'r*, 63 Mo. 119; *Lumber Co. v. Warner*, 93 Mo. 374. (4) The subsequent acts of the parties under the contract, giving practical construction to its terms, may be shown by parol. *Wolfe v. Dyer*, 95 Mo. 551; *Patterson v. Camden*, 25 Mo. 13; *Jones v. De Lassus*, 84 Mo. 545.

BARCLAY, J.—There are two appeals in this cause. That of the plaintiff will be first considered. It concerns the correctness of the findings and judgment in favor of defendant, Mr. Harrison, upon the first three counts in the petition.

These causes of action are founded on debts, in the shape of notes, which existed in favor of plaintiff from his son, Mr. Ellis, Jr., at the time when the latter and defendant, Mr. Harrison, formed the firm of Harrison & Ellis, February 1, 1885. By the partnership articles, of the date last mentioned, it may be conceded that the new firm assumed the "mercantile debts" of the then "jobbing business" of Mr. Ellis, Jr., and that thereby Mr. Harrison became liable (as a partner in Harrison & Ellis) for debts so assumed.

If the plaintiff's demand, stated in the three counts mentioned, was a "mercantile debt," within the true intent and meaning of the contract containing that expression, then the plaintiff could maintain an action thereon.

In Missouri a person, for whose benefit an express promise is made, in a valid contract between others, may maintain an action upon it in his own name.

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Meyer v. Lowell (1869), 44 Mo. 328; *Rogers v. Gosnell* (1873), 51 Mo. 466; *Fitzgerald v. Barker* (1879), 70 Mo. 685; s. c. (1884), 85 Mo. 14.

This proposition is now too firmly settled as part of the law of this state to require re-examination. Whether it is logically deducible from common-law principles (as has been sometimes doubted) it would serve no useful purpose now to consider. It has been accepted here, as in most of the American states, because it is supposed to furnish a useful rule in practice, tending to simplify litigation. By following it, one action often effects the same results that two would be required to accomplish without it.

Moreover, by our code of procedure, it is provided that every action shall be prosecuted in the name of the real party in interest, with certain exceptions, one of which is that the trustee of an express trust may sue in his own name. The statute then declares that such a trustee "shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." R. S. 1889, secs. 1990, 1991. Reading these sections together, it would seem to be clearly implied that the beneficiary in such a contract is to be regarded as a real party in interest, and that, as such, he may sue thereon in his own name; while, on the other hand, the contracting party (as trustee of an express trust, within the statutory definition) may likewise maintain an action on the same contract. *Snyder v. Express Co.* (1883), 77 Mo. 523.

The right of the beneficiary of such a promise, though not a direct party to it, to sue upon it, has occasionally been approved by English judges, though it is not conceded by them generally, at least not to the same extent, in actions at law, that such right has been recognized in this country in recent years. With us it cannot fairly be considered longer an open question, in view of the many precedents already made, from which there seems no sufficient reason now to depart.

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II. But at the time the partnership agreement was made between Mr. Harrison and Mr. Ellis, Jr., were the notes, owing by the latter to his father, the plaintiff, "mercantile debts" of the "jobbing business?"

The answer to this decisive question involves several considerations. Whatever right of action a third party to such an engagement may acquire by virtue of its terms against either of the directly contracting parties, it is clear that, on principle, such right cannot be broader than the party to the contract (through whom the right of action is derived) would have in event of its breach. To state this in another form, the right of action by any outside beneficiary, for whose advantage a contract is made between two other persons, is entirely subordinate to the terms of that contract, as made. Such beneficiary cannot acquire a better standing to enforce the agreement than that occupied by the contracting parties themselves. *Crowe v. Lewin* (1884), 95 N. Y. 423; *Wheat v. Rice* (1884), 97 N. Y. 296. The plaintiff's rights in the case before us flow from the agreement between Mr. Harrison and Mr. Ellis, Jr., and are confined within the scope of that agreement, interpreted according to the rules of law. If the parties, when it was made, understood and intended the expression "mercantile debts" (as used therein) to exclude the notes in question, the plaintiff cannot enlarge its meaning for them. They were the contracting parties. It is their contract to be enforced, and plaintiff has no such relation to the subject as permits him to assert the contract different from what they mutually agreed it should be.

This brings us naturally to consider some of the exceptions to rulings upon the evidence bearing on this point.

The trial court, it appears, admitted testimony of the acts and declarations of Messrs. Harrison & Ellis, Jr., between themselves, and the original entries in their firm books, at and about the time of the beginning

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of their partnership, to show what construction they then placed upon the phrase "mercantile debts."

The object of interpretation always is, or should be, to reach the actual intention of the parties. We mean, of course, that intention as expressed in the writing they employ to portray it, and consistent with the latter. When the subject-matter to which such a writing refers is not entirely definite and clear, it is permissible, and obviously just, to receive in evidence a description of the circumstances of its execution that the court may be placed, as near as may be, in the situation of the contracting parties with a view the better to adjudge in what sense the language used was probably intended by them. *Swett v. Shumway* (1869), 102 Mass. 365; *Keller v. Webb* (1878), 125 Mass. 88.

Furthermore, the construction placed by the parties themselves upon the words "mercantile debts," as shown by the opening entries in the books of the firm of Harrison & Ellis, was properly admissible in evidence. In case of doubt as to the significance of such a term, the contemporaneous practice of the parties to the agreement regarding it (before any controversy arises) sheds light upon their probable meaning in its use. Here, all the circumstances of the agreement and the construction by the parties at the time point to the conclusion that the plaintiff's claims (which the three counts of his petition recite) were not intended to be comprehended by the words "mercantile debts" of the "present jobbing business" of Thos. Ellis, Jr.

At all events, a conclusion to the contrary could not fairly be pronounced as one of law. It was, at least, a question of fact on the evidence as to the mutual intention of the parties in that regard. Plaintiff opened up his case with testimony to show that the notes mentioned were "mercantile debts." By the declarations of law which the learned trial judge gave, at plaintiff's instance, the question, whether or not they were such, was directly submitted for a finding of

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fact, which the court thereafter made. Having assumed that position at the trial, the plaintiff cannot properly now be heard to say that the trial court should have pronounced the plaintiff's demands "mercantile debts," as a matter of law.

We find no error to the prejudice of plaintiff in the proceedings upon the three counts mentioned.

III. There remains for consideration the appeal by defendant Harrison. The judgment against the latter is for \$411.66, on the fourth count, and there may hence be some question of the jurisdiction of this court to determine that appeal. But under the constitutional provisions governing this subject we are of opinion that where, as here, the plaintiff has appealed from a judgment, obviously involving (as to him) some \$8,000, this court has jurisdiction to adjudicate, incidentally, a pending appeal to this court, in which a part of the same judgment, favorable to plaintiff, is sought to be reversed by a defendant. Plaintiff seeks to have the judgment set aside as to three of the causes of action, and the finding as to the fourth maintained.

The entire judgment is thus brought here for review. In such a state of the case we think the constitution does not contemplate successive hearings in the cause, first of one appeal in this court, and then of the other by one of the courts of appeals. Compare *United States v. Mosby* (1889), 133 U. S. 273. So we proceed to consider the merits of the appeal by the defendant.

IV. This action was begun by attachment May 4, 1885. The draft which forms the basis of the fourth count of plaintiff's petition bears date April 14, 1885, payable sixty days thereafter. It did not, therefore, mature until some time after the beginning of this proceeding. Defendant Harrison contends that the judgment on the fourth count cannot be sustained in view of these facts.

The bill described was negotiable. Upon plaintiff's acceptance he became, on the face of it, the principal

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debtor, and, as such, liable to the holder for value to whom the firm of Harrison & Ellis had sold it for the purpose of realizing proceeds. The liability of plaintiff upon the paper was fixed; but, as his acceptance was for the accommodation of Harrison & Ellis, the latter were bound to make good to the plaintiff any payment he might make upon it. When this action was begun, therefore, plaintiff was liable by its terms to a third party, the holder at that time. Until plaintiff took it up and thereby sustained some loss by reason of his acceptance, he had no demand against Harrison & Ellis on account of the same. Had they met the paper at maturity (as they were bound to do as between plaintiff and themselves) no liability to plaintiff on their part would have arisen in the premises; for, until plaintiff paid something on account thereof, such an acceptance amounted merely to a loan of plaintiff's credit to Harrison & Ellis, and could not be regarded as a loan of money. Under the laws of this state, an attachment will lie in many instances to enforce an existing demand, though not yet due (R. S. 1889, sec. 522); but our statute on this subject has never been held to sanction such a proceeding upon such facts as are disclosed in this case. *Hearne v. Keath* (1876), 63 Mo. 84; *Read v. Ware* (1847), 2 La. Ann. 498.

Defendant objected at every stage to the proceedings on the fourth count, substantially on the ground above noted. We think the court should have sustained the objection. No other assignments of error appear to require remark.

The judgment is reversed and also the finding for plaintiff, as against defendant Harrison on the fourth count of the petition. The findings on the first three counts are affirmed, and the cause is remanded to the circuit court for such further proceedings as may be in harmony with this opinion. SHERWOOD, C. J., BLACK and BRACE, JJ., concur.

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THE CHICAGO, SANTE FE & CALIFORNIA RAILWAY
COMPANY, *Appellant*, v. MCGREW.

DIVISION TWO.

1. **Eminent Domain: CONDEMNATION FOR RAILROAD: DAMAGES.** The damages to be paid for land condemned for railroad purposes and on which the owner has a coal mine and appliances should be a compensation for the whole of the property as it remained at the time the appropriation was made in view of the uses to which the land appropriated was to be applied.
2. ——— : ——— : PECULIAR BENEFITS. Any benefits the construction and operation of the railroad would add to the property not taken, by way of increased facilities for marketing coal, should be deducted from the damages, but such benefit should be peculiar to the property on account of the uses made of it.
3. ——— : ——— : DAMAGES TO COAL MINE. The damages assessed should not be confined to the surface of the land and the machinery in use in the business, but should also apply to the internal arrangements of the mine and the appliances therein provided for its economical and successful operation and to all the external arrangements which add to its value.
4. ——— : ——— : ——— : RAILWAY CONNECTION. The facilities for the transportation of coal and railway connection with the mine is a valuable property right which belongs to the owner of the land, and if injured by the appropriation of the land, such injury will constitute a damage to the remaining property for which compensation should be made, although the railroad switches and tracks making the connection with the mine belonged to the railroad company.
5. **Condemnation for Railroad: COAL MINE: AVERTING DAMAGE.** The damages should be estimated as of the date of the assessment by the commissioners, and on the assumption that defendant had adjusted or would adjust his property to its changed condition so soon as it could be reasonably done, and in such manner as to avert all damages that could be avoided by reasonable care and expense.
6. ——— : ——— : ———. If the business of defendant as a miner of coal was necessarily interrupted by reason of the appropriation of a part of his land, compensation should be allowed for the reasonable value of the use of the mine during the period of such necessary interruption.

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7. — : — : —. Where a railroad company condemns a right of way across the owner's lot in such a way as to separate his engine from his mining shaft and machinery at the pit top, it is proper for the jury in estimating the depreciation of the value of the property to take into consideration the number and speed of passing trains, the danger of accidents to defendant's employees and the risk of fires.
8. — : — : —. The connection of the mine with a railroad other than plaintiffs is a valuable property right, and if necessary changes and readjustment of engine, shaft and other appliances rendered it necessary to change the railroad connection the reasonable expense of the same should be allowed in estimating damages.
9. — : — : —. Where it becomes necessary to wholly abandon the shaft because of the condemnation, its value should be allowed in estimating damages and not the expense of making a new one.
10. — : — : —. It is not error to instruct the jury, if the appropriation of the right of way has entirely cut off defendant's connection with the other road and so prevented the operation of the mine, defendant is entitled to damages from the loss of business from the filing of the commissioners' report to the completion of plaintiff's road.
11. — : — : —. The defendant is entitled to compensation in money and cannot be required to accept in lieu thereof licenses and privileges to go upon and use the right of way or a release of part of it.
12. — : — : —. Where the switch, chute, pit top and other connections of the mine are not actually taken, though they may have been rendered valueless for the purpose for which they were designed, it does not follow that they have become valueless for all purposes and it is erroneous to instruct the jury to allow damages to the extent of their full value instead of their depreciation in value.
13. — : — : —. Since plaintiff had a right to show that the value of the property was not totally destroyed, but that the mine could still be operated, an instruction that plaintiff, after taking defendant's property, could not insist upon his using the strip taken, either by a superstructure or by means of a subterranean device or by any other means which tended to increase the dangers to his employees or the inconveniences or dangers of operating the shaft which would make it difficult to get careful and prudent men to work in the mine, was misleading.

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14. **Practice: INSTRUCTIONS.** Instructions should be complete in themselves and not remit the jury to the pleadings to ascertain their scope or meaning.

Appeal from Ray Circuit Court.—HON. JAMES M. SANDUSKY, Judge.

REVERSED AND REMANDED.

Gardiner Lathrop and C. T. Garner, Jr., for appellant.

(1) The court erred in excluding competent evidence offered by the plaintiff. *Dorlan v. Railroad*, 46 Pa. St. 520. (2) Besides, the cost of building new chutes and a new switch were not only not proper elements of damage, but they were not even claimed in defendant's "answer and cross petition" by which he is bound. While the pleading may in the first instance have been unnecessary, yet having made it he ought to be limited and bound by it. 1 Rorer on Railroads, pp. 383-4; *Railroad v. Linn*, 14 Am. & Eng. R. R. Cases (Neb.) 198; *Fleming v. Railroad*, 34 Ia. 353; *Railroad v. Lansing*, 16 Barb. 68; *Railroad v. Whalen*, 11 Neb. 585; *Railroad v. Hummel*, 27 Pa. St. 99; *Patten v. Railroad*, 33 Pa. St. 426; *Dorlan v. Railroad*, 46 Pa. St. 520; *Gilmore v. Railroad*, 104 Pa. St. 275; *In re Railroad*, 53 Barb. 457; *Railroad v. Palmer*, 24 Pac. Rep. (Kan.) 342. (3) The court erred in refusing plaintiff's eighth instruction as asked and in modifying same. *Bridge Co. v. Schaubacher*, 57 Mo. 582; *Springfield v. Schmook*, 68 Mo. 394; *Railroad v. Waldo*, 70 Mo. 629. (4) The fifteenth instruction, as modified, is subject to substantially the same objections as the eighth. Again the jury would be left to speculate and conjecture. The modification of plaintiff's sixteenth instruction so as to permit the liability to injury from accident to "be considered in so far as it may bear on the question of the practicability of an over pull" ought

not to have been made by the court. (5) The instructions asked by the plaintiff which the court refused should have been given, and the instructions given by the court at the instance of defendant abounded in errors.

J. D. Shewalter for respondent.

(1) The offer or statement of a party "to give" or sell a right of way is not competent on a trial of an assessment of damages. The statute makes it incumbent on the plaintiff to attempt a settlement with the land-owner, before applying for the appointment of commissioners; the proof that an effort was so made, and the parties failed to agree, being a jurisdictional fact, the propositions *pro* and *con.*, looking to that end are privileged. 1 Redfield on Railways [4 Ed.] sec. 69, p. 246; *Refining Co. v. Elevator Co.*, 82 Mo. 121; *Gray v. Railroad*, 81 Mo. 126; Mills on Em. Domain [2 Ed.] sec. 112, and authorities, n. 3 and 4; *Railroad v. Miller*, 125 Mass. 1; 1 Rorer, 30 and 302; 1 Redf. on Railways, p. 247, and note. (2) The mere difficulty of ascertaining damages—if such difficulties exist—is no reason for not allowing damages at all. 1 Sedgwick on Dam., top p. 200, note a. (3) And when part of the property is taken, which is essential to use of another part, the assessment should include the loss to business, or value of the property for the time necessary to make the change, so as put the property in working order, in reference to the changed conditions. Mills on Em. Dom., secs. 192, 177 and 179; *Bridge Co. v. Schaubacher*, 57 Mo. 582; *Pattison v. Boston*, 19 Pick. 166; *Pattison v. Boston*, 23 Pick. 425; 3 Sutherland on Dam., pp. 438, 440; *Railroad v. Copps*, 72 Ill. 188; *Railroads v. Hill*, 56 Pa. St. 460; 2 Wood on Railroads, pp. 918 and 919 and note 5, 921, 905, 907, note 3,896; 1 Wood, pp. 709, 672, n. 707; 1 Rorer, on Railroad, 383, 376, 385, 388. (4) The court committed no error as to the instructions.

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MACFARLANE, J.—This is a suit to condemn a right of way thirty feet wide over lot 939 in block 122, out-lot 19 in the town of Camden, Ray county, the property of defendant. Commissioners were appointed by the judge in vacation. They made an assessment of \$3,000 damages and filed their report. This report was afterwards set aside by the court upon exceptions filed by the defendant. The case was tried by a jury, and a verdict of \$7,000 returned, upon which judgment was rendered against plaintiff.

The evidence shows that this lot was about one hundred and fifty feet in length north and south, and fifty feet in width. Defendant also owned lots 938 and 940, adjoining, and on either side of lot 939, being of the same dimensions. At the point where these lots are located, the Missouri river runs nearly east and west. The track of the Wabash railroad extends along the bank of the river near the water's edge. On the north side of, and adjacent to, the right of way of the Wabash railroad a public street was located. These lots abutted on this public street. Plaintiff located its railroad adjacent to and parallel with the Wabash road, occupying the street by consent of the town, and providing another street north of its located line. Defendant also owned a large tract of coal land lying north, northeast and northwest of these lots. About the center of lot 939, defendant had sunk a coal shaft, by means of which his coalfield was worked. North of the shaft about forty-five feet, and on the same lot, defendant had located his engine-house and engine by which the shaft was operated.

Through lots 938 and 940 defendant had condemned its right of way through to the vacated street on the south. From the river north, the land ascended into the hills beyond the railroads. From a switch of the Wabash railroad a spur or sidetrack extended opposite

the shaft. At the entrance of the shaft was a superstructure called a pit top. From this two trestles, one above the other, extended towards the river. These trestles were provided with tracks, and, by means of small cars, the *debris* of the mine was carried over the upper one and dumped into the river, and the coal was carried over the lower one to the sidetrack of the Wabash road and loaded into its cars. The shaft was about fourteen feet in dimensions east and west, and seven feet north and south. The coal and *debris* were brought up through the shaft by means of two cages, one on the east and one on the west side of the shaft, which were lowered and raised by means of a wire cable extending from the engine over a pulley at the top of the pit top. From the bottom of the shaft small rail tracks diverged to different parts of the mine by which the coal was carried from the mine to the shaft and raised by the cages.

Plaintiff's railroad was located between this shaft and the engine-house, somewhat nearer the engine than the shaft, thus separating them. In order to operate the mine it was evident that some readjustment of the existing arrangements would have to be made. Several plans were proposed and evidence offered to prove their practicability, the expense necessary to make the changes and readjustment thereunder, and the time necessarily consumed in so doing. The land actually taken was of insignificant value. The damage claimed by defendant and not controverted by plaintiff was on account of interruption of the mining business of defendant, the expense of readjustment and the loss while necessarily engaged in making changes.

The theories upon which the plaintiff insisted the changes could be made, and upon which evidence was offered, were as follows:

That the works could be operated without relocating either the engine or shaft, by what was denominated either an over pull or under pull. The former plan was to erect a superstructure at the engine and operate the

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mine by a cable through this superstructure over the right of way to the pit top; the latter was to tunnel under the track and make the connection through the tunnel. Another plan was to move the engine up the hill to the north and pass the cable over the track to the pit top. Plaintiff's evidence tended to prove the practicability of these theories, and defendant's evidence tended to prove their impracticability.

Defendant insisted that the only feasible arrangement that could be made was to abandon, entirely, the new shaft, sink another further up the hill north of the location of plaintiff's railroad, and move the engine and engine house also north. This plan, it was contended, would necessitate the abandonment also of the connection with the Wabash railroad, and delay the business of defendant until a new connection could be made with plaintiff's road when built. Evidence was offered tending to prove the practicability of this readjustment and the expense thereof, the time it would take to complete the change and of damages for loss of the use of the mine until working arrangements could be perfected by connection with plaintiff's road.

Plaintiff also advanced a theory for readjustment, which it insisted was practicable and would entail much less expense than any of those proposed. This was to remove the engine to the south side of the location of its road on the south end of either lot 938 or 940, which it had already condemned for its right of way. To prove the practicability of this plan plaintiff offered to prove that it had tendered to defendant a release to the south part of these lots to be used for locating the engine-house and engine. This evidence was excluded.

Over plaintiff's objection, evidence was offered by defendant, and admitted by the court, tending to prove that there would be liability of fire escaping from locomotives and igniting the engine-house and machinery and the superstructure to the shaft while in such near proximity to the railroad, and there would be also increased

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risk to laborers should the engine and shaft be separated by the railroad.

Defendant filed a bill of the items of his damages as follows :

“Damages for being cut off from Wabash railroad until completion of plaintiff’s road. \$30,000 00	
Permanent damages for being cut off from the	
Wabash switches, etc.....	5,000 00
Value of present shaft.....	5,000 00
Damages to mining property arising from uncertainty of sinking new shaft and danger of water and sand flowing in and damaging mines	
	5,000 00
Cost of moving and altering engine, new engine-house and pit top.....	
	2,000 00
Changes at bottom of mine.....	1,000 00
Damages to mines arising from having to cross and recross railroad in going to and from same.....	
	1,000 00
<hr/> “\$49,000 00”	

The court gave the jury a number of instructions asked by plaintiff, and also refused a number. Several were also given on request of defendant, and the court, on its own motion, gave instructions covering the whole case. It would be impossible to review these instructions in detail within a reasonable limit, and, without attempting to do so, we will merely consider the legal propositions enunciated by them, and undertake to ascertain the law that should govern in determining the rule of damages as applied to the facts in this case.

I. The constitution, as well as common right and justice, requires, that when a railroad corporation exercises the extraordinary power of appropriating to its own use the property of another, that just compensation should be first paid. Just compensation implies

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adequate compensation, a fair equivalent, a just indemnity. On the other hand, some of the private rights of citizens must give way to great public enterprises, and while the citizen is entitled to just compensation, he is entitled to no more than what is just and adequate. In ascertaining the compensation, in such cases, the ordinary rules for measuring damages, as far as practicable, have been applied. It has, therefore, been held, that "the correct rule to be applied relates to the value of the land to be appropriated, which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner, in the condition in which he has seen fit to leave it. And when less than the whole estate is taken, then there is further to be considered how much the portion not taken is increased or diminished in value in consequence of the appropriation."

The benefits derived, which are to be taken into consideration in the assessment of damages, are the direct and peculiar benefits resulting to the land in particular, and not the general benefits accruing to it in common with other land which is enhanced in value by the erection of the improvements. *Bridge Co. v. Ring*, 58 Mo. 496; *Railroad v. Richardson*, 45 Mo. 466; Cooley's Const. Lim. 567; *Railroad v. Chrystal*, 25 Mo. 546; *Railroad v. Waldo*, 70 Mo. 632.

This rule has been acted upon in this state from the time the question first came before the courts; it has ever been regarded as eminently just and fair, and, in most cases, of easy practical application. No reason can be seen why it should not be used as the basis for estimating plaintiff's compensation in this case. The peculiar character of defendant's property, the underlying coalbeds which give it value, the machinery and appliances in use necessary in making the property productive, the railroad connections which facilitate the commerce of the productions, and the complications

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arising from all these, make the application of these simple rules exceedingly difficult in this case.

The damages to be paid are to compensate for the injury to the whole of the property as it was left, at the time the appropriation was made, in view of the uses to which the land appropriated was to be applied. Any benefits the construction and operation of plaintiff's road would add to the property, by way of increased facilities for marketing coal, should have been deducted from the damage. Such benefits would be peculiar to this property on account of the uses made of it.

It is evident the damage to the property should not be confined to the surface of the land, and the machinery in use in the business, but should also apply to the internal arrangement of the mine, and the appliances therein provided for its economical and successful operation, and to all external arrangements which add to its value. If the shaft, in use when the condemnation was made, could no longer be used, the damage would not be confined to the loss of the shaft, but should include such damage to the internal arrangement of the mine as would result from the necessary abandonment of any part of such appliances, or their readjustment to necessary changes.

The facilities for transportation of coal and railroad connection with the mine is a valuable property right, which belongs to the owner of the land, and, if injured by the appropriation of the land, this would constitute a damage to the remaining property, for which defendant should be compensated, though the railroad switches and tracks making the connection belonged to the railroad company. 3 *Suth. on Damages*, 441; *Lewis on Em. Dom.*, sec. 235; *Rigney v. Chicago*, 102 Ill. 64.

It is the duty of one, sustaining damages by reason of the act of another, to use all reasonable exertion to protect himself and avert, as far as practicable, the injurious consequences of such act. *Douglass v.*

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Stephens, 18 Mo. 366; *Waters v. Brown*, 44 Mo. 303; 1 Sutherland on Dam. 148. It was, therefore, the defendant's duty to adjust his property to its changed condition as soon as it could reasonably be done, and in such manner as would avert such damages as could be avoided by reasonable endeavors and expense. The damages should have been estimated as of the date of the assessment by the commissioners and on the assumption that defendant had incurred, or would incur, every reasonable expense, and use every reasonable exertion, in the management and readjustment of his property to protect himself from damage.

If the business of defendant was necessarily interrupted, by reason of the appropriation of a portion of his land, compensation should have been allowed for the reasonable value of the use of the mine during the period of such necessary interruption. In estimating the damage for this cause, it would have been proper to consider the probable length of time the business would necessarily have been suspended, the season of the year, and all circumstances that would tend to increase or diminish the value of the business interrupted, and the consequent loss therefrom. Mills on Em. Dom., sec. 192; *Bridge Co. v. Schaubacher*, 57 Mo. 582; *Patterson v. Boston*, 23 Pick. 425; *Railroad v. Capps*, 72 Ill. 188. Conjectural profits of the business in the future are too speculative and uncertain to be allowed as damages. Mills on Em. Dom., sec. 177; *Railroad v. Patterson*, 107 Pa. St. 464; *Railroad v. Walsh*, 106 Ill. 255.

These principles were generally adopted and applied by the court throughout the trial, and the general instructions given fairly presented the rule of damages, governing the facts and circumstances in the case. There are some special exceptions urged by appellant which deserve separate consideration.

II. The court instructed the jury, by amendments to some of those asked by plaintiff, in substance, that,

in determining the practicability of such proposed changes as required the operation of the shaft on one side of the road by means of the engine on the other side, they might consider the frequency of trains passing over the road, and the rapidity of their movements, the increased liability of injury to employes of defendant from accidents, and the risks of damage by fires from passing locomotives. Appellant insists that the court erred in so amending these instructions.

It is true, as a general proposition, damages should be assessed on the assumption that the road will be properly constructed and operated, and that it will comply with all the laws of the state regulating its construction, management and operation. For failure of duty in these respects, it will be liable to an action at common law, or the land-owner will have such remedy as may be provided by statute. *Railroad v. Baker*, 102 Mo. 553; *Lyon v. Railroad*, 42 Wis. 538; *Railroad v. Whalen*, 11 Neb. 590. Notwithstanding these settled principles, which apply generally, we are of the opinion that the facts in this case are exceptional, and that the instructions as limited by the court were proper.

When we remember the close proximity of the railroad to the engine on one side, and the shaft and superstructure on the other, and that employes of defendant would necessarily be engaged over and about the track of the road, it will be readily seen that damage from accident may occur, for which the railroad company would not be liable. It is clear, that persons exposed to danger, as defendant's employes would necessarily be, could not perform their labors with the same degree of efficiency, and, at the same time, exercise the care to avoid danger which the law imposes on them, as they could if not so exposed. The extra risk might also cause a demand for higher wages. Neither can a railroad company be held liable for all fires that may originate from its locomotives. They may occur through no fault of the company. Defendant would

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also be under obligation to exercise care and watchfulness, under the circumstances, to avoid and prevent damage from fires, and this duty might impose additional expense upon him. So it will be seen that the general rule cannot, in justice, be applied to its full extent, under the facts in this case. It would not be proper to estimate the possible damage from fires or injuries to persons. Neither may ever occur, and to take them into the estimate would be mere speculation. We think they may properly be considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further. *Lewis on Em. Dom.*, sec. 497; *Mills on Em. Dom.*, secs. 166, 163; *Railroad v. McComb*, 60 Me. 290; *Ham v. Railroad*, 61 Iowa, 716; *Railroad v. Anderson*, 39 Ark. 167; *Railroad v. Henry*, 79 Ill. 290; *Pierce v. Railroad*, 105 Mass. 199; *White v. Railroad*, 6 Rich. Law, 47.

III. As has been stated, the connection of the mine with the Wabash railroad was a valuable property right, which belonged to defendant and was a part of the property that may have been affected by the appropriation. Whatever damage was occasioned by the interference with this right should have been allowed in the estimate. If necessary changes and readjustment of engine, shaft and other appliances for conducting the business rendered it necessary to change or modify the railroad connection, or to make a new one, then the reasonable expense of making such changes, or making a new connection, should have been allowed, and there was no error in the court so instructing the jury.

If the appropriation rendered it necessary to wholly abandon the shaft, then its value should have been allowed as damage, and not the expense of making a new one. But, in the consideration of a general scheme of readjustment of the appliances for working the mine, evidence of the cost of a new shaft would be proper enough. In considering the cost of a new shaft,

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mere speculations as to possible difficulties in the way of doing so should not be made. Such difficulties should be considered much as a contractor would regard them in estimating the cost, and allowances therefor should be made accordingly. The rulings of the court on this subject were substantially correct.

IV. At the request of the defendant, the court gave the jury the following instruction: "If the jury believe from the evidence that the strip sought to be taken lies immediately between the engine-house and the shaft of defendant; that defendant had also a switch and connection with the Wabash railroad by means of which, and of tracks and tramways, leading from the shaft, cars on said switch were loaded, and if the jury further believe from the evidence that, by the location of plaintiff's road, and the taking of said strip, the shaft of defendant cannot be operated with the engine on the opposite side of the track, with safety, and that for that reason he, the defendant, has been unable since the location of the plaintiff's road to operate his coal shaft, then the defendant is entitled to recover all the damages, if any, the jury believe from the evidence he has sustained thereby, from the date of the filing of the report of the commissioners and the payment of the money into court by the plaintiff up to the completion of the plaintiff's road; such amount of damages to be determined by the rule hereinafter stated." Plaintiff objects to this instruction on the ground that the period, for which it is to be held liable for loss of business, is too indefinite and uncertain to form a basis for calculating damages.

If the entire use of the Wabash road, as a means of transportation, was destroyed by the appropriation of defendant's land, and no rearrangement could have been made, then the damage on this account should have been the entire value of such connection, which should have been reduced by the benefits that might thereafter have been derived from the operation of

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plaintiff's road. The damage to which defendant was entitled was the difference between what was the fair value in the market of his whole property before and its value after the appropriation, in view of the uses to which the land condemned should thereafter be applied. The schemes for readjustment, and the evidence of the practicability and cost thereof, were only allowable as what seems to be a reasonable and practical method of estimating such difference of value. Both parties seem to have agreed upon the theory for estimating the damage and benefits, upon the basis of the cost of certain readjustments of the works, and the loss of business until they could be effected. The instruction complained of was only following out the theory adopted by the parties. Plaintiff was entitled to have the damage reduced by the value of the benefits of its road when completed. These benefits would consist of the means for transportation of defendant's coal to market. There would be the same difficulty, and uncertainty in determining when these benefits would begin, as in determining when defendant's losses, from being deprived of his connection with the Wabash road, would end. Defendant's property could only be appropriated by plaintiff for the purpose of building its road thereon. The court had the right to assume that it would do so in a reasonable time thereafter. Plaintiff could have given the court and jury, approximately, the time at which it would be completed. The rule given by the court was as definite and certain as any that could have been given, and, at the same time, allow plaintiff the advantage of the benefits of its road in reduction of damages.

V. The court also gave the jury the following instruction on the request of defendant: "That, except at public or private crossings, a railroad company is entitled to the exclusive possession of its right of way, and no person has the right to go upon such railroad track, nor use the surface of the right of way for any purpose; nor can any railroad company either grant or

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consent to any such use, this rule being not alone for the benefit of the railroad, but also for the public, and if the jury believe from the evidence that none of the devices or means introduced in evidence could be erected or made, or, if erected or made, could be successfully operated or used without the agents or employes of defendant going on the right of way of plaintiff, then the jury are instructed defendant would not be permitted to erect or maintain the same, or, if, on the other hand, the jury should believe from the evidence that the erection, making or maintenance of any such devices, under or over the track, would in any degree endanger the operation of such railroad, or the safety of the traveling public, no matter how slight the danger or how improbable the occurrence might be, the defendant would have no right to erect, make or maintain the same, or the railroad company any authority to consent to any such erection."

Though the interest acquired by a railroad company to its right of way, through condemnation proceedings, is regarded as a mere easement, yet the law contemplates the right to an absolute and exclusive possession, and control thereof, as against the private rights of the owner of the fee, the proprietors of adjacent land and all others. The only exception made by the statute being for the benefit of the owner of a farm divided by the road, who is entitled to a private way or farm crossing under section 809, Revised Statutes, 1879. In view of the nature of the business of the railroad company, and its obligations to the public, such exclusive possession is necessary and proper, in order that it may perform fully the purposes for which it is authorized and used. Judge REDFIELD in *Jackson v. Railroad*, 25 Vt. 159, says: "The railroad company must * * * have the right, at all times, to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the former owners in any mode and for any purpose." So in this state one, in no manner connected

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with the railroad company, who goes upon its track, at a place other than a public or private crossing, is a trespasser. R. S. 1879, sec. 809; *Rine v. Railroad*, 88 Mo. 398.

No sufficient reason can be seen why, by agreement between the parties interested, certain rights, not inconsistent with the public interest, might not have been reserved by the land-owner so as to secure to himself a limited use of the right of way, under such circumstances as existed in this case. Yet such a reservation must have been by consent of both parties; neither could have been required to grant or accept them. Defendant was entitled to compensation in money, and could not, without his consent, have been required to accept in lieu thereof licenses or privileges, however beneficial to him they may seem to be. After a failure to agree on the compensation, or other arrangements mutually satisfactory, the parties go into court, not as contracting parties, but as antagonistic, and each has the right, if he sees fit to do so, to stand on his legal rights and insist on his legal remedies and yield nothing of either. So the parties stood in the trial of this case,—plaintiff demanding the unrestricted right of way, and defendant insisting on just compensation in money for his land appropriated.

Efforts to agree, which were required to be made before legal proceedings could be instituted, having failed, all previous negotiations or offers were at an end, and could only be viewed in the light of efforts to compromise, and evidence of their character and extent was not admissible. Plaintiff had no more right to tender, or to prove that he had tendered, defendant certain privileges, than the defendant had to offer to donate, or prove that he had offered to donate, the right of way if a different location should be adopted. *Mills on Em. Dom.*, sec. 112; *Presbrey v. Railroad*, 103 Mass. 4; *Hill v. Railroad*, 7 N. Y. 155; *Railroad v. Melville*, 66 Ill.

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329; *Railroad v. Haller*, 7 Ohio St. 220; *Railroad v. Halstead*, 7 W. Va. 302; Lewis on Em. Dom., sec. 505.

VI. What has been said substantially disposes of the question raised on the trial by the offer of plaintiff to prove a tender to defendant of a release of part of its right of way on the south ends of lots 938 and 940 for the location of his engine. This tender was made pending negotiations prior to the institution of proceedings, or pending the inquiry of damages by the commissioners. For the reasons above stated, defendant could not be required to accept anything but money in compensation for his land. While the tender was ostensibly gratuitous, the purpose of it unquestionably was with a view of reducing the damages, and was nothing more than the offer of privileges as part compensation.

While duty may require of one sustaining damage, from the act of another, to use all reasonable exertion and expense to avert as far as practicable the injurious consequences of such act, yet in a case of this character, in which property is taken for public uses without the consent of the owner, no recognized principle can be imagined which would require the land-owner to accept other land in exchange, as compensation, in part or in whole, for the land appropriated. We are cited to no authority, nor have we been able to find any sustaining such a doctrine. It may also be seriously questioned, whether, after land has been appropriated to public uses, it can be transferred unconditionally to another for a private use. The authorities are against such right. Mills on Em. Dom., sec. 57; *Belcher Sugar Refining Co. v. Elevator Co.*, 101 Mo. 200; *Strong v. Brooklyn*, 68 N. Y. 1. If the offer was that of a mere license, it would have been revocable at the pleasure of the licensor, and the right to revoke may have been exercised before any benefits were received from the license. In any event defendant could not, against his consent, be required to accept the offer of a license, while it was questionable whether the power to confer

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it existed, and while it was doubtful whether, if accepted, it would have subserved the practical purpose for which it was designed. We think there was no error in excluding the evidence.

VII. Defendant's second instruction was as follows: "If the jury believe from the evidence that defendant has, in connection with the Wabash railroad, a switch and coal chutes; that by the taking of his strip, between the engine-house and shaft, he will be compelled to sink a new shaft, and that this will cut him off from the Wabash, then the plaintiff is required to erect and build for the defendant on demand therefor a switch and switch connection with its road, defendant paying the cost thereof; and, if the jury should believe from the evidence, that, by sinking such shaft, defendant will be cut off from the Wabash railroad with the right of way of plaintiff's road between the new location and said Wabash railroad, then the jury will find for the defendant on the second item of damages claimed for such sum, not exceeding \$5,000, as they may believe from the evidence was the value of the switch, chutes, pit top and other connections, thus rendered useless for the purposes for which they were erected, such value to be estimated at the time of taking said strip."

We think there was error in this instruction. From the fact that the switch, chutes, pit top and other connections may have been rendered valueless, for the purposes for which they had been designed, it does not follow that they were valueless for all other purposes. This property was not actually taken. It still belonged to defendant. When property is taken its value should be paid. When not taken, but only injured, its depreciation in value only should be allowed. Values should not be estimated exclusively for any particular use. Everything which gives it intrinsic value is to be taken into consideration, and its capabilities for any use to which it may be put. 3 Suther. on Damages, 441;

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Lewis on Em. Dom., sec. 464. The damages on this item would have been the depreciation in the value of the property mentioned and not the full value.

VIII. The third instruction given defendant was as follows: "The jury are instructed that in condemning a right of way, through or over defendant's property, the plaintiff has no right to take the same, and after so taking it insist upon the use of the strip, by the defendant, in the necessary running of his business, either by a superstructure, ropes and pulleys overhead, together with a bridge, or by means of a subterranean device, or by any means whatever, provided, any such means or device in any degree increases the danger to the lives or the limbs of his employees, or so increases the inconveniences or dangers, in running and operating the shaft, as for that reason he would be unable to get careful and prudent men to work in said mine, or, if from any causes, any such system would be impracticable and he, the defendant, could not, for any such reasons, compete with other persons engaged in the same business."

This instruction may also have misled the jury. The object of the trial was to ascertain the damage to the property of defendant by the appropriation. In order to prove the damage, it was competent for defendant to offer evidence which might tend to prove a total loss of the use of his lands for mining purposes, and on the other hand plaintiff had the right to show that the property could still be used and the mine operated by certain changes of the appliances necessary to its operation. The jury was to determine the damage from all the evidence. If the mine could be worked by means of the change, proposed by plaintiff, then the expense of the change and the value of the property thereafter, should have been considered by the jury, though great expense and inconvenience might attend its operation on account of the changed condition. The difference in

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value should have been estimated and compensated for, in money.

IX. We are not able to see that the fourth instruction authorized an estimation of the value of the old shaft and also the cost of a new one, as contended by plaintiff. That instruction is as follows: "If the jury believe from the evidence that by reason of the taking of the strip of ground, thirty feet wide, by plaintiff it is necessary for the defendant, in safely or properly conducting his business, to sink a new shaft, as declared in other instructions, then they will find for the defendant as to such items. And if the jury believe from the evidence that, in sinking a new shaft, there are elements of uncertainty which make the same hazardous and which increase the value of a shaft already successfully sunk and in successful operation over the actual cost of sinking it, then the jury are instructed that, in arriving at the value of the present shaft, they are not confined to its actual cost, merely, but should add thereto such further or additional sum as will represent the true value of the shaft already sunk and in operation, and for that sum you should find for the defendant, in that case, under the third and fourth items, not exceeding \$10,000 on both items. And in arriving at the value of the shaft, it is not to be fixed at a forced sale but its value in and in connection with the business it was used for."

The reference in this instruction to the third and fourth items of damage contained in defendant's bill of particulars, did not probably mislead the jury, though such a reference should not have been made. Instructions should be complete in themselves, and not remit the jury to the pleadings, to ascertain their scope or meaning.

On account of misdirections contained in instructions 2 and 3, the judgment is reversed and the cause remanded. All the judges of this division concur.

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GRAY V. McDONALD, *Appellant*.

DIVISION ONE.

1. **Crime, Civil Action for: MERGER.** The right of action for an injury done in the commission of a felony or misdemeanor is not merged in the public offense. (R. S. 1879, sec. 1673.)
2. ——— : ———. A criminal prosecution by the state and a civil action for damages arising from the same act may be carried on at the same time against the same defendant.
3. ——— : ———. A judgment of acquittal in the public prosecution will constitute no defense in the civil suit for the same defendant, nor for his abettor.
4. **Third Section of Damage Act: CAUSE OF ACTION.** Under Revised Statutes, 1879, section 2122, known as the third section of the damage act, the cause of action survives to the designated person, if the injured party would have had a common-law or statutory right of action, if death had not ensued.
5. ——— : ———. A new cause of action is not created by said section.
6. ——— : **ABETTOR OF HOMICIDE.** When one is present at a homicide exciting and encouraging the battery that results in the killing, he becomes a party to the wrongful act and is liable to an action for damages under section 2122, *supra*, the same as the actual slayer.
7. ——— : ———. The evidence in this case considered and held to support the verdict on the issue that the defendant was present exciting and encouraging the homicide.
8. ——— : **CONTRIBUTORY NEGLIGENCE OF DECEASED.** Contributory negligence of the deceased is no defense to an action by a widow under Revised Statutes, 1879, sections 2122 to 2123, for the intentional killing of her husband.
3. ——— : **EXEMPLARY DAMAGES.** Exemplary as well as actual damages may be recovered in such action.

Appeal from Livingston Circuit Court.—HON. JAMES
M. DAVIS, Judge.

AFFIRMED.

104 303

109 536

104 303

119 341

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142 558

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145 112

80a 316

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84a 581

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88a 361

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102a 355

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C. T. Garner & Son, J. L. Farris, J. A. Cross and F. Sheetz for appellant.

(1) Under the statute authorizing this action only the person who committed the homicide is liable. It is the wrongful act producing death which creates the liability. *R. S. 1889, sec. 4426; Proctor v. Railroad*, 64 Mo. 112; *Dulaney v. Railroad*, 21 Mo. App. 597; *Jackson v. Railroad*, 87 Mo. 424. (2) The presence of defendant at the difficulty and his not interfering to prevent it, his striking Gray with his fist after the shooting and the approval of the latter are not sufficient to create a liability. *Gray v. McDonald*, 28 Mo. App. 477; *Cooper v. Johnson*, 81 Mo. 483. (3) The record shows the homicide on the part of young McDonald was a justifiable or excusable one. *Morgan v. Durfee*, 69 Mo. 469; *Nichols v. Winfrey*, 79 Mo. 544. (4) The death of deceased was in part occasioned by his own concurring or contributory act which bars recovery in this case. *Craig v. Sedalia*, 63 Mo. 417; *Kempinger v. Railroad*, 3 Mo. App. 581; *Smith v. St. Joseph*, 45 Mo. 452; *Smith v. Railroad*, 61 Mo. 592; *Powell v. Railroad*, 76 Mo. 80; *Henry v. Railroad*, 76 Mo. 288. (5) The damages are excessive.

Crosby Johnson, John E. Waite, Davis & Rogers, J. F. Harwood, J. D. Ross and C. H. Mansur for respondent.

(1) The doctrine of contributory negligence has no application to cases of this sort. *Gray v. McDonald*, 28 Mo. App. 477; *Besendecker v. Sale*, 8 Mo. App. 211; *Nichols v. Winfrey*, 79 Mo. 40; *McCue v. Klein*, 48 Am. Rep. 260; 60 Tex. 168; *Cooley on Torts* [1 Ed.] 162. (2) If two persons by mutual consent, in anger, fight together, each is liable to the other for actual damages inflicted. *Shay v. Thompson*, 48 Am. Rep.

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538 ; 59 Wis. 540 ; Cooley on Torts [1 Ed.] 159 and 163 ; *Dole v. Erskine*, 35 N. H. 503. (3) One who brings on a difficulty, with the purpose of killing his adversary and then does, in the course of the difficulty, kill him, cannot shield himself under the law of self-defense *State v. Gilmore*, 95 Mo. 554 ; *State v. Parker*, 96 Mo. 383. (4) As the son had brought on the difficulty, and the defendant was present and knew all the facts, neither the defendant nor his son had a right to kill Gray to save the son from peril which he had brought upon himself, until after the son had done all he could to avoid the killing of Gray. 2 Bish. Cr. Law, sec. 665 ; *State v. Linney*, 52 Mo. 40. (5) As defendant was present aiding and encouraging his son, he must be regarded as a principal and held responsible for the consequences of his son's acts. *Gray v. McDonald*, 28, Mo. App. 477 ; *Cooper v. Johnson*, 81 Mo. 483. (6) After the son had provoked the difficulty, the defendant could not legally take the life of Gray to save the son's, until the son had abandoned, or offered to abandon, the contest. *Crowder v. State*, 8 Lea, 669 ; *State v. Greer*, 22 W. Va. 800. (7) As the defendant stood ready to defend his son, he was guilty even though his assistance had not been given ; for in such case his presence would have given encouragement to the son. *Allred v. Bray*, 41 Mo. 484 ; *State v. Nelson*, 98 Mo. 414 ; *State v. Hildreth*, 51 Am. Dec. 371, and note. (8) Evidence of the defendant's good character was improperly admitted, and cannot be considered in determining the case. *Brown v. Evans*, 17 Fed. Rep. 912 ; *Elliott v. Russell*, 92 Ind. 526 ; *Sowell v. McDonald*, 58 Miss. 281. (9) The court did not err in striking out the fourth count of the answer, pleading the acquittal of W. W. McDonald. The parties to that case, both plaintiff and defendant, were different from this. Hence, the judgment there was not evidence for or against either party. Freeman on Judg., sec. 319 ; *Dugg v. Stumpe*, 73 Mo. 513. (10) As the defendant

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in his instructions adopted the theory, that, if the defendant had aided his son in the difficulty, he was liable, he will not be heard to complain of the plaintiff's instructions. *Bank v. Armstrong*, 92 Mo. 265. (11) By adopting the same theory as to the facts that would make him liable, he is now estopped from saying that the theory was erroneous. *Reilly v. Railroad*, 94 Mo. 601. (12) There was no error in refusing the refused instructions, as, so far as they were correct, their principles were embraced in those given. *Brown v. Railroad*, 99 Mo. 310. (13) Where there are elements of wantonness and malice, the jury is authorized to award exemplary damages. *Goetz v. Ambts*, 27 Mo. 29; *Kennedy v. Railroad*, 36 Mo. 365; *Welsh v. Stewart*, 31 Mo. App. 376; *Clark v. Fairley*, 30 Mo. App. 336. (14) The jury were authorized to exercise discretion in awarding damages and the sum awarded was not excessive. *Adams v. Railroad*, 100 Mo. 555; *Waldhier v. Railroad*, 87 Mo. 38.

BLACK, J.—The plaintiff who is the widow of John Q. Gray brought this suit against William W. McDonald and William G. McDonald, to recover damages for killing her husband.

William W., having been acquitted in a criminal prosecution, the suit was dismissed as to him. On the second trial the plaintiff recovered a judgment for \$1,500 which was reversed by the Kansas City court of appeals. 28 Mo. App. 477. The third trial resulted in a judgment for plaintiff for \$4,000, from which this appeal is prosecuted.

The amended petition upon which the cause was tried states in substance that William W. McDonald intentionally and maliciously shot and killed Gray, and that the defendant, William G. McDonald, aided and abetted in the killing.

William W. McDonald was a young man about twenty years old and resided with his father, the present

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defendant. Gray and the McDonalds lived within three-fourths of a mile of each other, and near the village of Lisbonville in Ray county. The defendant says he was on friendly terms with Gray, though it appears he had not been at the latter's house for a year before the shooting. The McDonald house had been searched by an officer for alleged stolen boots, and it appears young McDonald had heard that Gray instigated the search, and that Gray accused him of stealing the boots. It does not appear very clearly when the boy first received this information, but we infer it was on the day of the shooting.

The village of Lisbonville is a small place, with a few houses arranged around what is called Allen's Mill. Bishop's store fronted south and had a porch in front of it, and the mill stood less than one hundred feet south of the store. Langford's store fronted east, and the mill was one hundred feet nearly east from that store.

Young McDonald had been to the village in the forenoon, and returned in the afternoon. He borrowed a coat and pistol at Bishop's store, left for a short time and then returned. In the meantime, the defendant had arrived and was sitting on the porch with some other persons, and the boy sat down by his father. From the evidence of defendant it appears he and the boy had some conversation about the information the boy had received, to the effect that Gray instigated the search and accused the boy of stealing the boots, but the record is not clear as to how long this conversation lasted, though it could not have been long. While the defendant, his son and others were sitting on the porch, Gray came out of the mill with a sack of meal on his shoulder, going to Langford's store. The boy said, "There goes old John Gray, and I am going to tackle him about the boots," or, as another witness says, "Now is a good time to settle with old Gray about the boots." The boy got off the porch and

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walked towards and addressed Gray in profane and exceedingly vulgar language. Gray turned around, raised his hat, and said to the boy, "How do you do, Mr. McDonald," and then walked on, and the boy repeated the same or nearly the same language that he had before used. Gray, having reached the sidewalk, threw down his sack of meal and asked the boy what he wanted, and the boy said, "I mean what I say, I can lick you," or as one witness says, "I intend to lick you." Gray then said, "If you want anything come over here and you can get it," and the boy replied, "I will meet you half way."

One witness states what then transpired in these words: "Mr. Gray advanced toward him and young McDonald drew a revolver from his right-hand pants pocket and put it partly behind him. When Mr. Gray saw him draw his pistol and put it behind him, he picked up a stone and advanced on toward young McDonald, who said, 'Old man Gray, you are marching to your grave.' Gray threw the stone at McDonald, who dodged down, and it did not hit him. Young McDonald took his pistol from behind him and shot Gray in the left breast. Gray kept advancing toward him, and McDonald shot him again in the left breast, not more than five or six inches from where he first shot him. Old man McDonald seized old man Gray by the left shoulder with his left hand and struck him two licks with his right fist. It appeared to be on the back of his head or on the neck. Mr. Gray turned and said something, but I did not understand what it was."

Gray died within thirty minutes, and according to another witness Gray said: "The scoundrel has shot me," and the defendant said, "Yes, he ought to have killed you."

One witness states that at the time Gray picked up the stone, "old man McDonald was standing three or four feet from his son, between his son and the porch of Bishop's store. Old man McDonald was in plain

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view of his son when his son drew his pistol. Was about six feet from him. He said nothing to prevent his son from shooting Gray, He said nothing to his son at the time he drew his pistol nor at the time he did the shooting; did nothing but walk up to Gray and take hold of his shoulder and strike him twice, as I have related." According to one of plaintiff's witnesses defendant said to the boy when the latter first spoke to Gray, "Let him go," and another witness for the plaintiff testified that old man McDonald said in a careless way, "Oh, never mind about that."

Defendant borrowed \$30 and left for Hamilton immediately after the shooting, but we are not informed where Hamilton is. According to Langford, defendant said when borrowing the money, "We have to get out of this pretty quick." Evidence of subsequent statements of defendant tends to show that he interfered because he thought Gray more than a match for the boy, but these statements are denied by the defendant.

The evidence of the defendant is to the effect that he repeatedly told the boy to let Gray alone, that he interfered for the purpose of separating them and that he did not strike Gray. George C. McDonald, who was an eye-witness to the transaction, says defendant told the boy twice to let Gray alone; that defendant told Gray not to throw the rock at his son.

1. On motion of the plaintiff the court struck out that part of the answer which set up the fact that William W. had been indicted for the murder of Gray, and upon a trial was duly acquitted of the charge, and this ruling is assigned as error.

The right of action for an injury done in the commission of a felony or misdemeanor is not merged in the public offense. R. S. 1879, sec. 1673. A criminal prosecution by the state, and a civil action for damages arising from the same act, may be carried on at the same time against the same defendant. Cooley on Torts, 88. The parties to the two actions and the redress afforded

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by them are different; so that according to the plainest principles of law a judgment in one proceeding is no bar to the prosecution of the other. Freeman on Judg., sec. 319. Hence, it has been held, and properly held, that in a suit by a widow against a party for killing her husband, the record of acquittal of such party on an indictment for murder of the husband is irrelevant. *Cottingham v. Weeks*, 54 Ga. 275. The judgment of acquittal on the indictment against William W. McDonald would constitute no bar or defense to this suit against him, and it must follow that it constitutes no bar or defense in this action against the alleged aider and abettor. Indeed it was long ago held by this court in an action of assault and battery that the plaintiff could recover exemplary damages, though the defendant had been convicted and fined in a criminal prosecution for the same offense. *Corwin v. Walton*, 18 Mo. 72.

2. It is next insisted by the appellant that this action is founded on section 2122 of the Revised Statutes, 1879, being the third section of the damage act; that by that section the person only who committed the act of homicide is liable in damages to the designated survivor of the deceased, and hence a demurrer to the evidence should have been sustained. The first branch of the proposition is conceded; but we do not agree to the second in the sense in which it is pressed by appellant. The statute declares: "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the injured party to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

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This section like the preceding one does not, as is often supposed, create a new cause of action; it transmits to the designated persons a cause of action when the injured person would have had one, had death not ensued. In other words the cause of action does not abate by reason of the death of the person injured. *Proctor v. Railroad*, 64 Mo. 112; *White v. Maxey*, 64 Mo. 552.

The first inquiry, therefore, is, whether the injured party would have had a cause of action against the defendant for the wrongful act causing death, had death not ensued. *Crumpley v. Railroad*, 98 Mo. 36. If the injured party would have had a common-law or statutory cause of action, had death not ensued, then the cause of action survives to the designated person. Now in order to make the defendant liable in a common-law action for damages it is not necessary to show that he actually fired the shot. As said by this court in *McMannus v. Lee*, 43 Mo. 206, any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks or signs, or who in any way or by any means countenances or approves the same, is in law deemed to be an aider and abettor, and is liable as a principal. But, on the other hand, it is to be borne in mind that mere presence at the commission of a trespass or other wrongful act does not render a person liable as a participator therein. If he is only a spectator, innocent of any unlawful intent, and does no act to countenance or approve those who are actors he is not liable.

The same principles of law were approved and asserted in the subsequent case of *Cooper v. Johnson*, 81 Mo. 483. That the defendant was present when his son invited the difficulty and shot Gray, is not disputed, and if, therefore, he excited or encouraged the trespass and battery which resulted in the death of Gray he was a party to the wrongful act, and occupies no better position than the boy, though he did not fire the shot which

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caused the death. The observations made in *Jackson v. Railroad*, 87 Mo. 424, are not at all in conflict with what we have said, for in that case the defendant had nothing whatever to do as aider, abettor, or otherwise, with the wrongful act which caused the death of the plaintiff's husband. The instructions given in this case present the foregoing principles of law favorably for defendant.

3. But it is insisted there is no evidence that the defendant by act or word aided or encouraged his son in the commission of the assault. There is certainly evidence tending to show that the boy invited, sought for and provoked the difficulty without any justifiable cause whatever. While two of plaintiff's witnesses say the defendant told the boy to let Gray alone, their evidence goes to show that this remark was made when the boy first spoke to Gray, and one of them says the remark was made in a careless way. What the defendant really meant by the remark depends much upon the manner in which it was made. But there is very positive evidence that defendant was on the ground and within three or four feet of his minor son when the latter drew the pistol and defendant said nothing to prevent the shooting. Though the defendant at first rebuked the boy, there is evidence tending to show that he subsequently, by his acts, if not words, encouraged the boy in the assault. It is our opinion there was evidence tending to show that defendant aided and encouraged the boy in the wrongful act. There was also contrary evidence, but it was for the jury to settle this conflict.

4. Very full instructions were given on both sides as to the right of the boy to defend himself and of the father to assist him in such defense, and, as no specific objection is made to these instructions or any of them, they need not be set out or especially noticed. We may say they appear to us fair to the defendant.

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5. It is argued that deceased was guilty of rash and imprudent conduct in stopping and laying down his sack and assuming an aggressive position, so that his own acts concurred in producing his death, and for this reason the plaintiff should not recover. Cases on contributory negligence are cited in support of the proposition.

This action is not founded on negligence at all, and in order to constitute contributory negligence on the part of the deceased there must have been negligence on the part of defendant. If the defendant is liable at all it is because he aided and assisted the boy in the commission of a wanton and wilful act causing the death of Gray. If the defendant's act was justifiable, then that is the end of the case; if it was not, then he is liable. As has been well said, an intentional assault inflicted upon one is an invasion of his right of personal security for which there is a redress by an action at law, and he cannot be deprived of his redress on the ground that he was negligent and took no care to avoid such invasion of his rights. Contributory negligence is, therefore, no defense in an action for an assault and battery. Beach on Cont. Neg., sec. 22.

6. The defendant complains of the following instructions given at the request of the plaintiff concerning damages:

"In case the jury shall find from the evidence that the shooting of plaintiff's husband by defendant's son was wrongfully inflicted in a spirit of hatred, ill-will or malice, and that it was done wantonly and without reasonable cause or just provocation or excuse, and shall further find that defendant, with full knowledge of such facts, was present, aiding, abetting, assisting or encouraging the son in his assault on and shooting her husband, then the jury, in assessing plaintiff's damages, are not restricted to the actual loss sustained by the plaintiff from the death of her husband, but the jury may award her such punitive and exemplary damages as they may

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think, under the circumstances, fair and just in addition to the actual loss resulting to her from her husband's death; provided, that the whole amount shall not exceed \$5,000."

There is an abundance of evidence tending to show that the boy shot and killed Gray wantonly and in a spirit of hatred and malice, and that the defendant, with full knowledge of these facts, aided and abetted the boy in shooting Gray, and under this state of facts Gray could have recovered exemplary damages had the shooting not caused his death. The real question is whether exemplary damages are to be allowed in any case where the suit is based upon the before-mentioned section 2122 of the statute. Section 2123 limits the recovery to an amount not exceeding \$5,000 as the jury "may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default."

Exemplary damages were allowed in many actions of tort before the passage of the statute in question, and aggravating and mitigating circumstances were admitted in evidence as affecting the amount of such damages. Thus provoking words which would not justify an assault and battery could be shown in mitigation, but no provocation would reduce the damages in such an action below the actual damages, unless it amounted to a justification. *Birchard v. Booth*, 4 Wis. 67. The expressions, aggravating and mitigating circumstances, were well known to the law when used by the legislature, so that the statute just quoted must mean that in these actions, based on section 2122, the party suing may recover not only actual, but also exemplary, damages; and this is the result of the former adjudications of this court. *Parsons v. Railroad*, 94 Mo. 286; *Nichols v. Winfrey*, 79 Mo. 544; *Smith v. Railroad*, 92 Mo. 360; *Morgan v. Durfee*, 69 Mo. 469; *Owen v. Brockschmidt*, 54 Mo. 285.

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The defendant makes frequent citations of *Porter v. Railroad*, 71 Mo. 66, as asserting a different doctrine, where it was said when speaking of statutes allowing relatives of the deceased person to sue, that the damages recoverable under them were actual only and not exemplary, save where the amount was fixed by the statute, citing *Field on Damages*, 498. No such question arose in that case, for it was a suit by the person injured. Again, it is clear the court was speaking in general terms of these statutes in different states, and did not have in mind the peculiar language of the statute of this state. As the author there cited says, such statutes generally provide only for actual damages; but in some states the statutes do in express terms or by implication provide for exemplary damages, and our statute belongs to that class.

The objection that the instruction did not allow the jury to take into consideration mitigating circumstances has no merit, for not a single circumstance was withdrawn from their consideration. Under it they were obliged to consider all the circumstances, even in awarding exemplary damages. The point made that the verdict is excessive is untenable. The judgment is affirmed. The other judges concur. BARCLAY, J., concurs in the conclusion reached and in the construction of section 4427 (R. S. 1889) but not in all the observations made touching exemplary damages in other cases.

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DIVISION ONE.

1. **Married Woman: SEPARATE ESTATE.** While no particular or technical words are necessary to create a separate estate in a wife, yet the intent to exclude the husband's common-law rights must clearly appear.

104	315
107	431
104	315
108	341
108	409
104	315
115	197
116	176
104	315
56a	509
104	315
123	462
104	315
128	89
104	315
131	288
63a	27
104	315
135	439
68a	402
70a	315
104	315
141	580
104	8
171	146

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104 315
 151 65
 151 427

104 315
 155 660

104 315
 87a 9
 87a 150

104 315
 163 486

104 315
 178 91

2. — : —. A devise of land by a testator to his two daughters "in their own rights" does not create a separate estate.
3. — : GIFT OF STOCK OR BONDS : STATUTE. The provision of General Statutes of 1865, chapter 115, section 19, that "any property consisting of stocks and bonds of any kind given by a parent to a daughter shall with the proceeds thereof belong to such daughter, if married, in her own right and shall not be subject to the payment of the debts of her husband and may be disposed of by such married daughter the same as if unmarried," applies only where there is a specific gift of the stocks or bonds as such.
4. — : — : —. Where a testator bequeaths to his daughter one-fifth of his estate and large sums are paid by the executors in distribution to her husband, the fact that such money is derived from dividends and interest on stocks and bonds will not, under said statute, deprive the husband of his marital rights therein.
5. — : PERSONAL PROPERTY : HUSBAND'S RIGHTS AT COMMON LAW : EQUITY. While by the common law marriage vested in the husband absolutely all her articles of personal property then owned or thereafter acquired by the wife, yet in equity the husband could waive his right thereto and permit her to retain the same free from any claim on his part.
6. — : CHOSE IN ACTION. A wife's chose in action did not vest in the husband by virtue of the marriage alone, but it was necessary for him to reduce it to possession to become the owner.
7. — : — : LEGACY. A legacy or distributive share coming from the estate of a decedent is a chose in action.
8. — : HUSBAND RECEIVING WIFE'S MONEY. Where the husband collects the money due upon his wife's chose in action, not as agent or trustee, but for the purpose of devoting it to his own use, there can be no doubt but this constitutes a reduction to his possession and the money then becomes his own and liable for his debts.
9. **Married Woman's Act**: PROPERTY PREVIOUSLY REDUCED TO HUSBAND'S POSSESSION. The act of March 25, 1875 (R. S. 1879, sec. 3296), did not attempt to reinvest the wife with title to property which the husband had reduced to possession, nor was it in the power of the legislature to deprive him of property which had become his own.
10. — : EXISTING MARRIAGES. Said act of March 25, 1875, secures to the wife her personal property and rights in action and applies to all cases where the husband had not, at the date of said act, possessed himself of his wife's personal property, no matter when the marriage took place.

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11. ——— : **VESTED RIGHT : CONSTITUTION.** The right of the husband to his wife's personal property and to reduce her choses in action to his possession is not a vested right and said act of March 25, 1875, is constitutional in its application to marriages existing at its date.
12. ——— : **"WRITTEN ASSENT" OF WIFE.** Under said act of 1875 the husband cannot acquire any interest in the wife's property, except on her assent in writing as provided in said statute and her money received by him after the going into operation of said act will be deemed to be held in trust for her in the absence of such assent in writing on her part.
13. **Homestead : HUSBAND AND WIFE.** Where the husband is the head of the family and both he and his wife have an interest in the same tract of land, each interest exceeding in value the homestead exemption and the husband is the debtor, the homestead exemption will be allowed him out of his interest.
14. ——— : **FRAUDULENT CONVEYANCE.** Creditors cannot complain of the conveyance of a homestead having been made in fraud of their rights.
15. **Married Woman : SETTLEMENT.** Where a wife's funds have become fully vested in the husband, a court will not divest them to make a settlement for her support.
16. ——— : **DEBTS DUE HER : FRAUDULENT CONVEYANCE.** A debt due a wife from a husband stands on the same footing as debts due any other person and he may even give her a preference over the latter, but he cannot convey his property to her in fraud of his creditors.

Appeal from St. Louis City Circuit Court.—HON. J. A. SEDDON, Judge.

AFFIRMED.

Boyle, Adams & McKeighan and John D. Davis
for plaintiff, appellant.

(1) The will of James Harrison, deceased, did not create a separate estate in his unmarried daughter, Cordelia Harrison, now Cordelia H. Leete. *Garner v. Jones*, 52 Mo. 68; *Paul v. Leavitt*, 53 Mo. 595; *Morrison v. Thistle*, 67 Mo. 596; *Bank v. Taylor*, 53 Mo. 450-455; 2 Rapalje & Lawrence's Law Dictionary, p.

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1132. (2) Section 19, chapter 115, General Statutes of 1865, did not make the greater part or any part of the money coming to Mrs. Leete, under the will of her father, her separate estate, or exempt from the debts of her husband. *Collier Will Case*, 40 Mo. 287; G. S. 1865, sec. 14, chap. 115; *Peck v. Walton*, 26 Vt. 86; *Clark v. Bank*, 47 Mo. 1. (3) The rights of Mrs. Leete, under her father's will, to one-fifth of the entire estate, was a chose in action within the meaning of the law, and as such entitled Dr. Leete *jure mariti* to take possession thereof, and appropriate the same for his own use and behoof. *Collier Will Case*, 40 Mo. 287; *Leakey v. Maupin*, 10 Mo. 368; *Watervelt v. Gregg*, 12 N. Y. 202; 2 Kent's Com. [12 Ed.] p. 135. (4) The money invested by Dr. Leete in the premises in controversy, having been secured to him by the exercise of his marital right to reduce his wife's legacy to possession, became and was Dr. Leete's own money; therefore, no resulting trust arose in Mrs. Leete to the premises in controversy, purchased and improved with such money. *Rogers v. Rogers*, 87 Mo. 259; *Modrell v. Riddell*, 82 Mo. 31; *Terry v. Wilson*, 63 Mo. 499; *Whitmore v. Learned*, 70 Me. 276; *Hyden v. Hyden*, 6 Bax. 407; *Boyd v. McLean*, 1 John Ch. 590; *Burns v. Bangert*, 16 Mo. App. 26. (5) As payment of the purchase money was not made by Mrs. Leete, when the title was taken, and as no obligation to pay was incurred by her at the time of the purchase, no subsequent payment, however clearly proved, would create any resulting trust in her favor to the premises in controversy. A resulting trust must arise, if at all, at the time the legal title is taken. Perry on Trusts, sec. 133; *Bottsford v. Burr*, 2 John. Ch. 408; 2 Pomeroy's Eq. Jur., sec. 1037; *White v. Carpenter*, 2 Paige, 217; 51 Am. Dec. 755, note. (6) There was no agreement between Mr. Leete and Mrs. Leete that the title to the premises in controversy should be taken in her name. There was, therefore, no trust created in favor of Mrs. Leete,

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when Dr. Leete took the title in his own name. *Kidwell v. Kirkpatrick*, 70 Mo. 214; *Ream v. Karnes*, 90 Ind. 171; *Wiley v. Basil*, 4 Md. Ch. 327. (7) Augustus B. Hart having without any notice of Mrs. Leete's alleged rights loaned a large sum of money on the faith of Dr. Leete's apparent ownership of the property in controversy, his right, or the right of a purchase under his judgment, should be enforced in preference to the wife's claim to a resulting trust in the property so apparently owned by Dr. Leete. *Zimmer v. Dansby*, 56 Ga. 79; *Brooks v. Shelby*, 54 Miss. 353; *McCoy v. Hyatt*, 80 Mo. 130. (8) The deed of December 9, 1884, cannot be upheld under the equitable doctrine of "equity to a settlement." 3 Pomeroy's Eq. Jur., secs. 1114, 1115, 1116; *Dold's Adm'r v. Geiger's Adm'r*, 2 Gratt. 98-110; 1 White & Tudor's L. C. in Eq. 674, and cases cited. (9) The deed of December 9, 1884, was not intended to be in consideration of any debt due by Dr. Leete to his wife, and cannot be upheld on any such theory. *First*. Such theory is not pleaded. *Second*. If it were, it is not true in fact. *Third*. There was no mistake of law or fact, and none claimed by the parties. *Fourth*. The rule permitting explanation of consideration has no application to this case. *Fifth*. There is no *data* for reforming the contract, no evidence on which to do it. *State v. Frank*, 51 Mo. 98; *Modrell v. Riddell*, 82 Mo. 31; *Brohammer v. Hoss*, 17 Mo. App. 1. *Sixth*. There was no issue at the trial concerning the existence of any debt to Mrs. Leete, and, if there was, it was not proved. (10) The married woman's act of March 25, 1875, is not retrospective, and cannot be held to exempt any money or property secured by Dr. Leete prior to its passage, in the exercise of his marital rights, from the payment of his own debts. *Richardson v. Lowry*, 67 Mo. 411; *Hitz v. Bank*, 111 U. S. 722; *Roberts v. Walker*, 82 Mo. 208; *Moses v. Dock Co.*, 84 Mo. 242; *Terry v. Wilson*, 63 Mo. 493. (11) The existence of a homestead right in Dr. Leete

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to \$3,000 worth of the property in controversy does not screen the balance of the property, in the neighborhood of \$30,000, from the just demands of Dr. Leete's creditors. *Crisp v. Crisp*, 86 Mo. 630; *Bunn v. Lindsay*, 95 Mo. 250; *Thompson v. Newberry*, 93 Mo. 18. (12) If Mrs. Leete has thirty-seven-hundredths of the premises in controversy, as found by the court below, the homestead right is left to the family, and should not be taken out of the sixty-three-hundredths of the property decreed to belong to the plaintiff. The husband and wife, both, are not entitled to the homestead. *Willis v. Matthews*, 46 Texas, 478-484; *Tourville v. Pierson*, 39 Ill. 447; *Gambette v. Brock*, 41 Cal. 78; *Thompson on Homesteads*, secs. 220-226. (13) As the circuit court never found that there was a valuable consideration for the deed to Mrs. Leete's trustee, and as the circuit court never found that there was a mutual mistake in respect to the consideration recited in the deed of December 9, 1884, and as such were not the facts, and were not supported by any evidence in the case, we do not argue, except incidentally in discussing the testimony, defendant's point 8, or subdivision 5 of their point 1. (14) There was no error in the refusal of the defendant's application to file an amended answer at the time, and under the circumstances attending the application. *Shields v. Powell*, 29 Mo. 315; *Gott v. Powell*, 41 Mo. 416; *Jones v. Hart*, 60 Mo. 364; *Vogler v. Montgomery*, 54 Mo. 577. (15) On the theory that Mrs. Leete has any interest in the premises in controversy, the referee adopted the correct method of apportioning the respective interests of Dr. and Mrs. Leete thereto. *Bowen v. McKean*, 82 Mo. 594; *Harrison v. Smith*, 83 Mo. 210; *Stoller v. Coates*, 88 Mo. 514. (16) Dr. Leete's right to reduce his wife's choses in action to possession and have and enjoy them and their proceeds as his own property was conferred upon him by the marriage contract between himself and wife in 1871. This right was not impaired or affected by the married

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woman's act of 1875. Accordingly, it is immaterial whether he exercised the right before or after the passage of the act. *First.* Concerning the character of the marriage contract. Reeves' Domestic Relations [4 Ed.] p. 251; *State to use v. Fry*, 4 Mo. 182. *Second.* What constitutes retrospective legislation or impairment of the obligation of the contract within the meaning of the constitutional prohibition? *State ex rel. v. Hayes*, 52 Mo. 578; *State ex rel. v. Grant*, 79 Mo. 113; *Green v. Biddle*, 8 Wheat. 84; Sedgwick on Construction of Stat. and Const. Law [2 Ed.] p. 160; *Ins. Co. v. Flynn*, 38 Mo. 484; *St. Louis v. Clemens*, 52 Mo. 144. *Third.* The right of the husband to reduce the choses in action of the wife to possession and have the fruits thereof as his absolute property was a recognized and valuable right at common law; also an assignable right and one which could be reached by the husband's creditors. *Abington v. Travis*, 15 Mo. 243; *Wood v. Simmons*, 20 Mo. 363-380; *Croft v. Bolton*, 31 Mo. 360; *Hockaday v. Sallee*, 26 Mo. 220; *Schuyler v. Hoyle*, 5 Johns. Ch. R. 196; Reeves' Domestic Relations [4 Ed.] p. 5, note. *Fourth.* The act of March 25, 1875, does not by its terms necessarily relate to the husband's rights in choses in action acquired by a wife before its passage. *Fifth.* If it was so intended to relate to such rights it is unconstitutional and void because it impairs the obligation of the contract, and is retrospective in its operation. *Dartmouth College Case*, 4 Wheat., p. 518; Wells on Separate Property of Married Women, pp. 93-95; *O'Connor v. Harris*, 81 N. C. 284-5; *Sherry v. Niles*, 57 Ga. 512; *Dunn v. Sergeant*, 101 Mass. 336; *Jackson v. Sublette*, 10 B. Mon. 467; *Ryder v. Hulse*, 24 N. Y. 372. *Sixth.* It is not necessary that the right, in order to be protected from invasion by the constitutional safeguards, should be either a right or an estate in property; a right to secure the property is equally

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protected by the constitution. *Warner v. Veitch*, 2 Mo. App. 463; *Gunn v. Barry*, 15 Wall. 610; *Phillips v. Schall*, 21 Mo. App. 44; *State ex rel. v. Greer*, 78 Mo. 193.

Edmund T. Allen, N. Oscar Gray and C. B. Allen
for defendants, appellants.

(1) Mrs. Leete, having the legal title to the property in her trustee, and having been at the date of the deed a creditor of her husband for more than the value of the property, her trustee can hold that title against any other creditor. *First*. She was such a creditor as to all money collected by her husband from Edwin Harrison after March 25, 1875, and lost by him in loans to, or indorsements for, the Harrison Wire Company. *Broughton v. Brand*, 94 Mo. 169; *Gilliland v. Gilliland*; 96 Mo. 522; *Cooper v. Standley*, 40 Mo. App. 138; *Harrison v. Smith*, 83 Mo. 210. *Second*. Dr. Leete's right to have preferred his wife as a creditor, and her right to have accepted the preference, cannot be questioned. Mere equitable obligations of like character have been held to be valid considerations for deeds. *Bump on Fraudulent Conveyances*, 316; *Bump on Fraudulent Conveyances*, 219; *Cole v. Shea*, 45 N. J. Eq. 786; *Kennedy v. Powell*, 34 Kan. 22; *Savage v. O'Neal*, 44 N. Y. 298; *Rudershausen v. Atwood*, 19 Bradwell, 58; *Crouse v. Morse*, 49 Iowa, 382; *Sims v. Moore*, 74 Iowa, 497. *Third*. Where equities are equal legal priority will prevail. *Thorndike v. Hunt*, 3 DeGex. & Jones 563; *Case v. James*, 29 Beav. 512; *Davidson v. Cowan*, 1 Dev. Eq. 470; *Muse v. Letterman*, 13 S. & R. 167; *Baird v. Williams*, 19 Pick. 381; *Ellis v. Kreutzinger*, 27 Mo. 311; *Ensworth v. King*, 50 Mo. 477; *Davis v. Ownsby*, 14 Mo. 170; *Martin v. Nixon*, 92 Mo. 26; *Black v. Long*, 60 Mo. 181; *Parks v. Bank*, 97 Mo. 130. *Fourth*. That Mrs. Leete did not formally release her husband from any part of this indebtedness, as consideration for the deed, is immaterial. *Williams*

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v. Robbins, 15 Gray, 590; *Chamberlain v. Dorrance*, 69 Ala. 40; *Dudley v. Dudley*, 45 N. W. Rep. (Wis.) 602. *Fifth*. If there was a mutual mistake, as the circuit judge says there appears to have been, by Dr. Leete and his wife, in respect of the consideration recited in the deed, that fact disposes of the averment of fraudulent intent under the circumstances of this case. The parties to the deed are not estopped by such recital. *Bean v. Patterson*, 122 U. S. 496; *Hitz v. Bank*, 111 U. S. 722; *Featherstone v. Dagnall*, 29 S. C. 45; *Coles v. Soulsby*, 21 Cal. 47; *Dudley v. Dudley*, 45 N. W. Rep. (Wis.) 602; *Minor v. Sheehan*, 30 Minn. 419; *Wolford v. Farnham*, 46 N. W. Rep. (Minn.) 295; *Fontaine v. Sav. Inst.*, 57 Mo. 561; *Baile v. Ins. Co.*, 73 Mo. 371; *Lielke v. Knapp*, 79 Mo. 27; *Sexton v. Anderson*, 95 Mo. 373. (2) The decree is erroneous in disregarding the defense of homestead made by the answer and sustained by the evidence. *Kendall v. Powers*, 96 Mo. 142; *Orr v. Shraft*, 22 Mich. 260; *State ex rel. v. Iron Co.*, 88 Mo. 222; *Davis v. Land*, 88 Mo. 436; *Grimes v. Portman*, 99 Mo. 229; *Beckman v. Meyer*, 75 Mo. 333; *Vogler v. Montgomery*, 54 Mo. 577. The defense of homestead in such an action has been sustained in other states in the following cases, and the list is by no means complete: *Derby v. Weyrich*, 8 Neb. 174; *Officer v. Evans*, 48 Iowa, 557; *Aultman v. Heiney*, 59 Iowa, 654; *Addicken v. Humphal*, 56 Iowa, 365; *Payne v. Wilson*, 76 Iowa, 377; *Smith v. Rumsey*, 33 Mich. 183; *Rhead v. Hounson*, 46 Mich. 243; *Pulte v. Geller*, 47 Mich. 560; *Orr v. Shraft*, 22 Mich. 260. (3) The exemption clause in the act of March 25, 1875 (R. S. 1879, sec. 3296; R. S. 1889, sec. 6869), applied as well to money received by Dr. Leete on account of his wife's inheritance prior to the date of that act, as to the money received by him thereafter from the same source. *Nance v. Nance*, 84 Ala. 375; *Burns v. Bangert*, 92 Mo. 167; *Richardson v. Lowry*, 67 Mo. 411 (1878); *Bledsoe v. Simms*, 53 Mo. 305. (4) The will of

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James Harrison impressed upon the bequest to Mrs. Leete the character of a separate estate. *Dugans v. Livingston*, 15 Mo. 151; *Morrison v. Thistle*, 67 Mo. 599; *Allison v. Chaney*, 63 Mo. 279; *Carter v. Alexander*, 71 Mo. 585; *Russell v. Eubanks*, 84 Mo. 82, and cases cited; *Reinders v. Koppelman*, 94 Mo. 338; *Preston v. Brant*, 96 Mo. 556. (5) Without regard to the will of James Harrison, section 19, chapter 115, General Statutes of 1865 (Wagner, p. 936), made by far the greater part of the money coming to Mrs. Leete prior to March 25, 1875, her separate estate, and exempt from the debts of her husband. This statute should be liberally construed. *Rogers v. Bank*, 69 Mo. 563; *Diver v. Diver*, 6 Smith (Pa.) 106, 109; *Paver v. Lester*, 17 How. Pr. 413, 416; *Goss v. Cahill*, 42 Barb. 310, 315. (6) Dr. Leete did not exercise his marital right of reduction to possession as to any of the choses in action of his wife. *Barron v. Barron*, 24 Vt. 375; *Slade v. Barber*, 30 Vt. 191; *Standeford v. Devol*, 21 Ind. 404; *Machen v. Machen*, 28 Ala. 374; *Hind's Estate*, 5 Whart. 138; *Gochenaur's Estate*, 23 Pa. St. 460; *Pierson v. Smith*, 9 Oh. St. 554; *McCampbell v. McCampbell*, 2 Lea (Tenn.) 661. (7) Under the circumstances of this case the wife's equity to a settlement was a sufficient consideration for the deed in question. *Smith v. Kane*, 2 Paige Chan. 302; *Wickes v. Clarke*, 3 Edw. Ch. 58; *Wickes v. Clarke*, 8 Paige Ch. 161; *Kenny v. Udall*, 5 Johns. Ch. 464; *Poindexter v. Jeffries*, 15 Grat. 363. (8) The circuit court, having found that there was a valuable consideration for the deed to Mrs. Leete's trustee, should have dismissed the petition. *Truesdell v. Sarles*, 104 N. Y. 164; *McGraw v. Gwin*, 7 Ired. (N. C.) Eq. 55; *Bragg v. Stanford*, 82 Ind. 234; *Syracuse Plow Co. v. Wing*, 35 N. Y. 421; *Whann v. Atkinson*, 83 Ala. 592; *Bremmerman v. Jennings*, 101 Ind. 253; *Sibley v. Hood*, 3 Mo. 290. (9) The consideration for the deed was not only valuable but adequate under the correct method of tracing trust funds.

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Harrison v. Smith, 83 Mo. 210; *Stoller v. Coates*, 88 Mo. 514; "The Progress of Equity in Following Trust Funds," 31 Cent. Law Jour. 125 and 145. (10) If doubt exists as to the construction to be given to the act of Dr. Leete in executing and delivering the deed, such doubt should be resolved in favor of defendants. *Dallam v. Renshaw*, 26 Mo. 544; *Rumbolds v. Parr*, 51 Mo. 592; *Henderson v. Henderson*, 55 Mo. 534; *Page v. Dixon*, 59 Mo. 43; *Ames v. Gilmore*, 59 Mo. 537; *Webb v. Darby*, 94 Mo. 621. (11) Plaintiff's contention below that Dr. Leete having been married prior to March 25, 1875, the act of that date did not and could not affect his relation to property coming to his wife prior or subsequently to its passage, is not sustained by the better considered cases, either state or federal. *Henry v. Dilley*, 25 N. J. L. (1 Dutch.) 302; *Pritchard v. Bank*, 8 Lou. 130; *Goodyear v. Rumbaugh*, 13 Pa. St. 480; *Johnston v. Johnston's Adm'r*, 31 Pa. St. 451. (12) As a rule of evidence the act of March 25, 1875, applied to all personal property, theretofore or thereafter acquired, in the manner therein stated, by women then married. *Ins. Co. v. Hill*, 86 Mo. 466; *Coe v. Ritter*, 86 Mo. 277; *St. Louis v. Eters*, 36 Mo. 456; *Rogers v. Bank*, 69 Mo. 560; *Rieper v. Rieper*, 79 Mo. 352; *McCoy v. Hyatt*, 80 Mo. 130. (13) Mrs. Leete is not estopped from claiming title in her trustee, under the pleadings and evidence in this case. Facts relied upon as an estoppel *in pais* must be specially pleaded. *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Hammerslough v. Cheatham*, 84 Mo. 21; *Railroad v. Levy*, 17 Mo. App. 509; *Bank v. Jennings*, 18 Mo. App. 657; *Kennedy v. Klein*, 19 Mo. App. 19; *Miller v. Anderson*, 19 Mo. App. 71, 75.

BLACK, J.—The plaintiff, as purchaser of real estate at an execution sale, brought this suit to set aside a deed from defendant, James M. Leete, to defendant Simmons, conveying the property in dispute to Simmons

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in trust for the use of the wife of said Leete, on the ground that the deed was made in fraud of creditors. The record is lengthy, and it is deemed advisable to here state the case in its outline, leaving the details of the evidence to be narrated in connection with the questions to which it relates.

James Harrison died leaving a large estate, and, by his will which was probated in 1870, devised one-fifth of his estate to his daughter, Cordelia. On the twenty-eighth of June, 1871, she married the defendant, James M. Leete, who was a physician, having property of no greater value than \$3,000, and an income of not exceeding \$1,000 per annum. Edwin Harrison was the executor of the will, and as such paid over to Dr. Leete from time to time, from 1871 to 1884, not less than \$250,000. In addition to this he turned over to Mrs. Leete on the twenty-ninth of September, 1876, stocks and bonds amounting, face value, to \$263,740.

Dr. Leete purchased the property now in question in September, 1873, and took the title in his own name. He paid for it \$12,000, one-fifth in cash and the residue by his individual notes due in one, two, three and four years, and secured the same by a deed of trust on the property. The cash payment was made by a check of the executor payable to Dr. Leete and charged to Mrs. Leete on account of her distributive share in her father's estate. The subsequent payments were made from the funds received from the executor.

Dr. Leete built a residence upon the property at a cost of \$40,000, and paid for the same from August, 1875, to August, 1876, by checks drawn on funds received by him from the executor on account of his wife's inheritance. He was a stockholder and officer of the Harrison Wire Company, and he indorsed the paper of that company to a large amount. On the twelfth of December, 1883, the Harrison Wire Company made its note for \$25,000 due in six months, payable to Dr. Leete, which was indorsed by him. Augustus B. Hart

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purchased the note, and when it became due it was renewed for five days. It remained unpaid on the ninth of December, 1884, at which time Dr. Leete owed other large sums of money, and he and the Harrison Wire Company were then insolvent. On that day he made the deed now in question to Simmons, conveying the property in suit to Simmons in trust for Mrs. Leete. The deed professes on its face to be made in consideration of \$5, and for the further consideration that the money which paid for the property and the improvements "was money, income, increase or profits of personal property belonging to" Mrs. Leete.

Augustus B. Hart recovered judgment on the note against Leete in January, 1885, under which the property was sold, and the plaintiff, Oliver A. Hart, became the purchaser in March of the same year. The defendants caused notice to be promulgated at the sheriff's sale to the effect that the property belonged to Mrs. Cordelia Leete.

The case was heard by a referee who made report to the effect that the deed should be set aside, because made in fraud of creditors, to the extent of six hundred and twenty-four-thousandths of the whole title. Numerous exceptions were filed to the report by both sides, but they were all overruled, and the report confirmed, and both sides appealed to this court.

1. The defendants on their appeal insist that the will of James Harrison impressed upon the property devised and bequeathed to Mrs. Cordelia Leete a separate estate. As to this the will is in these words: "To my two daughters, Cordelia Harrison and Medora Harrison, I give and bequeath to each one-fifth part of my entire estate, real and personal in their own rights."

It is well-settled law that no particular or technical words are required to create a separate estate. Any words which negative or exclude the marital rights of the husband will be sufficient. On the other hand, the marital rights of the husband to the property of his

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wife will not be excluded by mere inferences or conjectures. The intent to exclude his common-law rights must be clearly expressed. A necessary implication will be sufficient; but the purpose to create a separate estate must clearly appear. *Garner v. Jones*, 52 Mo. 68; *Paul v. Leavitt*, 53 Mo. 595; *Morrison v. Thistle*, 67 Mo. 596; 2 Story's Eq. Jur., sec. 1381. The words, "in their own rights," do not create a separate estate. They utterly fail to show or disclose any purpose on the part of the testator to deprive future husbands of the daughters of their marital rights. No case to which we have been cited goes to the extent of saying that such language will create a separate estate.

2. It will be seen from the foregoing statement that it becomes important to know to what extent Leete paid for the property in question, and the improvements thereon out of his own means, and this question must be resolved by ascertaining to what extent he became the owner of the money which he received from the executor on account of his wife's inheritance. In view of the different statute laws of this state, at different periods of time, concerning married women, it will be necessary to first confine the inquiry to the time prior to March 25, 1875. Up to that date Dr. Leete received from the executor about \$117,000. The money was paid to him from time to time out of moneys collected by the executor from various sources; but nearly eighty per cent. of the collections were dividends on stocks and interest on bonds, the estate owning the stock and bonds. The point now made is that the money received by Leete from the executor and which the executor received from such sources was the separate estate of Mrs. Leete by force and operation of section 19, chapter 115, General Statutes of 1865, which enacts: "Any property consisting of stocks and bonds of any kind, given by a parent to a daughter, shall, with the proceeds thereof, belong to such daughter, if married, *in her own right*, and shall not be subject to the payment of

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the debts of her husband, and may be disposed of by such married daughter the same as if unmarried ; such bonds or stocks, however, shall be subject to the proviso in section 14 of this chapter."

This section became the law of this state for the first time in 1865. It and several other sections of the same chapter were copied from the Vermont statutes. We do not find that the supreme court of that state has ever had this particular section under consideration, so that we get no aid from that source. It is our opinion the section has no application to the case in hand. It contemplates a gift of bonds and stocks, as such. It applies and applies only to those cases where there is a gift of bonds and stocks in kind, and was never designed to apply to cases where there is no gift of any specific property. In other words it enables the parent to make a provision for the daughter by a specific gift of such property. Here the testator simply gave his daughter one-fifth of his entire estate. It so transpired that after the payment of the debts there were stocks and bonds which could be and were divided. Before the incidents mentioned in the section will attach, it must appear that there was a specific gift of the stocks or bonds. We do not see how any other construction can be given to the statute.

3. With the foregoing conclusions it becomes necessary to determine whether Dr. Leete became the owner of the money received by him prior to March 25, 1875, and this depends upon the question whether he reduced the same to his possession.

It is often said that by the common law the marriage vests absolutely in the husband all articles of personal property then owned or thereafter acquired by the wife ; but under the influence of equity rules it is well settled that the husband may waive his right to his wife's personal property, and permit her to retain the same free from any claim on his part. *Botts v. Gooch*, 97 Mo. 88, and cases cited. But the wife's

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choses in action stand on still a different footing. They do not in any case vest in the husband by virtue of the marriage alone ; but he has the right and power to reduce them to his possession, and when this is done, and not before, he becomes the owner of them. A legacy or a distributive share accruing to the wife is a chose in action. *Leakey v. Maupin*, 10 Mo. 368 ; 2 Kent [13 Ed.] 135. As a general rule the receipt by the husband of the money due upon the wife's chose in action will constitute a reduction to his possession. 1 Bishop on Married Women, sec. 114. But he may collect and invest the money for her, and if he receive the money for her and promise to account to her or her trustee therefor, she may claim the fund as her own, even as against his creditors ; for an appropriation so made would not amount to an appropriation to his own use. *Terry v. Wilson*, 63 Mo. 493. While there is some diversity of opinion concerning the intent of the husband, the better view, according to Bishop, is that the mere receiving, by the husband, of the wife's property will not be such a reduction of it to his possession as will affect the wife's survivorship, or her equity to a settlement. To have that effect he must receive it solely in the exercise of his marital rights, and for the purpose of appropriating it to his own use. Bishop on Mar. Woman, sec. 119. When the husband collects the money due upon his wife's chose in action, not as agent or trustee, but for the purpose of devoting it to his own use, there can be no doubt but this constitutes a reduction to his possession, and the money then becomes his own and liable for his debts.

Now the principal claim on the part of the defendants is that Dr. Leete in collecting these moneys, and in investing the same, acted for and as the agent of his wife, and hence the money at all times continued to be her property. It appears he received various amounts of money from the executor during what is called each settlement year, and at the close of each year, when it

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became necessary for the executor to make settlement with the probate court, these various payments were consolidated, and he and his wife joined in one receipt to the executor. As to the disposition of the moneys, the referee made the following findings, which are well supported by the evidence: "Upon the receipt of these moneys Dr. Leete apparently used them as if they were his own. Some he used for personal expenses and the support of his family. He invested portions of them on his own account, or name, in securities. Collected and used the earnings and sold the securities and used the proceeds. He invested some of these moneys in various business companies, in his own name, and in some instances thus lost them. If the moneys were idle he kept them deposited in bank, in his own name, and he purchased the land here in question in his own name, and used some of these moneys towards paying for it and erecting the dwelling thereon. He did nothing in the name of his wife, nor had he any agreement with her as to the use of the moneys, but continued his operations in much the manner indicated, until the period and time he conveyed this property to his wife's trustee, a period of ten or eleven years."

It is very true Dr. Leete testified that he received the moneys and invested them as the agent of his wife, and that he never intended to make them his own property, and this evidence must be considered with the other evidence in the case. Still the uncontradicted evidence is that he collected the moneys, made no report to his wife and was asked to make none; kept no separate account of the funds thus received, purchased stock in various corporations in his own name, and had a financial standing in the community where he resided. We have read and re-read the evidence, and we do not find a single circumstance to support the assertion that he acted for and as the agent of his wife. The long series of acts show and they show conclusively that he received the funds and appropriated them by virtue of his marital

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rights, and the claim now made that he was all the while acting as the agent and trustee of his wife must be an afterthought. That he reduced the \$117,000 to his own use is too clear to admit of any doubt. The property in question belonged to Dr. Leete to the extent that the land and improvements were paid for out of the moneys so appropriated to his own use.

4. We then come to the act of March 25, 1875, now section 3296, Revised Statutes, 1879. This act did not attempt to reinvest the wife with title to property which the husband had reduced to his possession, nor was it within the power of the legislature to deprive him of property which had become his own. Property which he had acquired by the exercise of his marital rights, at the date of that act, continued to be his property and subject to the payment of his debts. These propositions are too plain to admit of any doubt.

But the evidence shows that Dr. Leete continued to receive moneys from the executor after that date the same as before. Indeed, there was no change in the manner of receiving and investing the money. In view of these facts the plaintiff insists, on his appeal, that he should have had a decree for the entire property. It is claimed, among other things, that the act of 1875 did not undertake to divest the husband of his marital right to appropriate to his own use debts due to his wife; and, if it did, then it is unconstitutional and void.

The act speaks of any personal property including rights in action "belonging to any woman at her marriage, or which may have come to her during coverture." All such property "shall be and remain her separate property and under her sole control."

There is no exception made for cases where the marriage relation existed at the date of the act, and we have no power to make one not made by the act itself. It secures to the wife her personal property and rights in action, and there can be no doubt but it applies to all cases where the husband had not, at the date thereof,

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possessed himself of his wife's personal property, no matter when the marriage took place.

The question then arises whether the act is constitutional in its application to those cases where the marriage relation existed at its date. It is said to be unconstitutional because it impairs the obligations of contracts, and because it is retrospective. It is perfectly obvious that if it is objectionable on either of these grounds it is because the right of the husband to his wife's personal property and to reduce her choses in action to his possession is a vested right. In the present case we are only called upon to say whether this common-law right of the husband to collect and appropriate to his own use debts due to his wife is a vested right.

On this question the courts are not agreed. In New York it is held that a right to reduce a chose in action to possession is one thing, and the right to the property thus acquired is another thing, but that they are both equally vested rights. *Watervoelt v. Gregg*, 2 Kernan, 202. The following cases reach the same conclusion, namely, that the right of the husband to obtain his wife's choses in action is a vested right: *Sterns v. Weathers*, 30 Ala. 712; *O'Conner v. Harris*, 81 N. C. 279; *Sperry v. Haslam*, 57 Ga. 412; others lead to the same result. It is insisted that this court long ago asserted the same rule in the case of *State, etc., v. Fry*, 4 Mo. 120. The question in that case was whether an act of the legislature granting a divorce was constitutional. While some of the arguments used in the opinion of one of the two judges who participated in that judgment favor strongly the doctrine just stated, still the case then in judgment is not in point here. We cannot take arguments for a solemn adjudication. The real point ruled was that the granting of a divorce was a judicial act, and that the legislature did not possess judicial powers.

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On the other hand many well-considered cases hold that the right of the husband to reduce his wife's choses in action to possession is not a vested right, so as to be out of legislative control. *Clark v. McCreary*, 12 S. & M. 347; *Executor of Henry v. Dilley*, 1 Dutcher, 362; *Goodyear v. Rumbaugh*, 1 Harris, 480; *Mellinger's Adm'r v. Bausman's Trustee*, 45 Pa. St. 526. In the last case it was said: "But the marital right of a husband over his wife's chose in action * * * never was an interest in it. It was no more than succession to her dominion. * * * He had nothing more than a naked power. No interest in the chose vested in him until he had exercised his power by applying it to his own use. No vested interest, no right of property of his, is then interfered with, though the act of 1848 takes away his dominion over a chose in action possessed by his wife when the act was passed." And it is in substance said in the case cited from 12 S. & M., that this right of the husband is simply a qualified one and is upon the condition that he reduce the chose into possession during coverture, and it is indispensable that such condition precedent should take place before there is any vested right.

Sedgwick in speaking of rights with which the legislature may not interfere says: "But, when we leave the subject of vested interests in real estate or actual property in possession, we find the subject surrounded with difficulty." Sedg. on Construction of Const. and Stat. Law [2 Ed.] 653. There are certainly many rights and privileges which are not vested. Thus a mere expectation of property in the future is not a vested right. Hence the rules of descent may be changed before the property passes to the heir. The right of the husband to secure his wife's rights in action may be exercised or not at his election. Until the right is exercised the chose is vested in her, not in him. Should he die without recovering the thing in action, it belongs to the

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widow, the same as before the marriage, and his representatives have no interest in it. When the husband asks the assistance of a court of equity to obtain possession of his wife's rights in action, he may be compelled to make provision for her support, which could not be done if he had an absolute right to the thing in action. From these considerations it appears to us the right of the husband to reduce his wife's choses in action to possession is merely inchoate and not a vested right. Bishop says marriage does not, at common law, vest the wife's choses in action in the husband, as it does an article of personal property in her possession. 2 Bishop on Married Women, sec. 45. Supported as we are by a line of well-considered cases, and by at least one text-writer, we are of the opinion that the common-law right of a husband to reduce his wife's choses in action to his possession is not a vested right; and that the act in question is constitutional, even in its application to marriages existing at its date.

5. According to the terms of that act it does not affect the title of the husband to any personal property reduced to his possession with the "express assent" of the wife; but it is also enacted that the property shall not be deemed to have been reduced to his possession by his use, occupancy, care or protection, and her assent must be *in writing* giving him authority to sell, incumber or dispose of the same for his own use and benefit.

In the early case of *Rodgers v. Bank*, 69 Mo. 562, it was said concerning this statute: "To put an end to all investigations, the law plainly requires the assent of the wife to be in writing." In *Broughton v. Brand*, 94 Mo. 169, the husband invested his wife's money in real estate taking the title in his own name, with her knowledge and verbal consent, and it was ruled that he held the title in trust for her and after her death for her heirs, and they were allowed to recover the property. And in *Gilliland v. Gilliland*, 96 Mo. 522, it was said

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the only way the husband can acquire any interest in the proceeds of the sale of his wife's land is the method pointed out by the statute, namely, by procuring her assent in writing. Applying the principle of these cases to the case in hand, it follows that Dr. Leete did not become the owner of any of the money received from the executor after the passage of the married woman's act of 1875, and that he held the property in question in trust for her to the extent of all of the payments made out of moneys received after that law took effect. This interest the referee found to be three hundred and seventy-six-thousandths, and that finding we approve. To that extent the deed from Leete to Simmons must stand.

The question whether Mrs. Leete ought, as between her and her husband's creditors, to be estopped from asserting title to the property by reason of her acquiescence in the continued use of her funds by her husband is not pressed in this court by the plaintiff, and need not be considered, though much is said in the brief of defendants upon that subject.

6. It is conceded by the plaintiff that the homestead right to the extent of \$3,000 did not pass to him by the sheriff's deed, but it is insisted that the homestead should be taken out of the wife's interest in the property. A case is then presented where one parcel of land is the homestead, in which the wife has an interest, and in which the husband has an interest, each interest exceeding in value the homestead exemption, and the husband is the debtor. The question is, from whose interest must the homestead be taken? According to the plain letter of the statute the homestead of the head of a family is exempt from attachment and execution. Dr. Leete was the head of a family and the execution debtor, and to him the law secures the exemption. No reason is seen why this exemption should be cut down because his wife has an interest in the same property. In this case the homestead cannot be severed, so that

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the property must be sold and the proceeds apportioned, or other proceedings had according to section 2698, Revised Statutes, 1879. Had Dr. Leete not made the deed to Simmons he would be entitled to the \$3,000.

Now we have held that the creditors have nothing to do with the homestead, for it is beyond their reach at law or in equity. As to them there can be no fraud in the disposition of the homestead. *Davis v. Land*, 88 Mo. 437; *Grimes v. Portman*, 99 Mo. 229; *Kendall v. Powers*, 96 Mo. 142. The homestead interest, therefore, passed to Simmons, who holds the same in trust for Mrs. Leete. This interest the court disregarded in its decree, and in that it erred.

7. But the defendants insist that the deed should not have been set aside as to any part or portion of the property, and one reason assigned is that Mrs. Leete had a right to a settlement for the benefit of herself and children out of her choses in action. The doctrine of a wife's equity to a settlement can have nothing to do with this case. When the wife's funds have by right fully vested in the husband, no court has the right to divest them for the purpose of making a settlement for her support. 2 Bishop on Married Women, sec. 629; 2 Kent, 142. The wife's equity to a settlement out of her things in action does not embrace those which the husband has fully reduced into his possession, 3 Pom. Eq. Jur., sec. 1116. Besides all this, Mrs. Leete has bonds and stocks to the amount of \$200,000 or \$300,000 which she received as part of her inheritance, so that she had abundant means of support.

8. For the defendants it is further contended that Leete owed his wife a large amount because of his use of her money; that he had a right to pay this debt due to her, and that the deed to Simmons as trustee should be upheld on that consideration.

That deed antedates the judgment under which plaintiff purchased the property, and, if it was made in good faith in payment of a debt due the wife, it should

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stand ; for a debt due to the wife stands on as good footing as a debt due to any other person, and she may be given a preference over other creditors. But there are several reasons why the defense now suggested cannot prevail in this court. In the first place the answer excludes the notion that Mrs. Leete took the property in payment of any debt due to her from her husband. It states time and again that he purchased the property and made the improvements with her money, and as her agent and trustee, and not otherwise. The claim set up in the answer is that she was the equitable owner of the property by reason of the fact that her, and not his, money paid for it. Indeed, the case was not and could not have been tried on the theory that she took the property in payment and satisfaction of a debt due to her. We can only review the case made by the pleadings.

But the proof, as disclosed by the present record, does not sustain the theory of fact that she took the property in payment of any debt due to her. While the evidence of Dr. Leete tends to show that he lost some \$200,000 by indorsements for the Harrison Wire Company, still it is impossible from this record to say how much of that amount was his money or how much her money.

We have seen that \$117,000 of the money received from the executor became his absolute property, and that a large portion of that amount was lost in the wire company venture is clear and beyond doubt. In the early part of 1884, which was nearly a year before the date of the deed to Simmons, Leete turned over to his wife a large quantity of stocks in various corporations, but there is no evidence as to the value of the stocks thus turned over to her, nor that they were taken by her at any specified price. On the theory that Leete became her debtor, there is nothing to show how much he owed her at the date of the deed to Simmons,

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nor to show that that deed was made in payment of any specified amount.

The whole case is simply this: From 1871 to 1884 Dr. Leete received the various sums of money from the executor and used them in various ventures as his own and on his own account, but when the crash came in 1884 he took the position that the property in his name belonged to his wife, without regard to the fact whether the property had been acquired with money received prior or subsequent to March 25, 1875. Mrs. Leete says she did not request her husband to make the deed, but that it was made with her approval. Her evidence is plain, direct and trustworthy and shows clearly that the deed was not made in payment of any debt. It was made on the theory of the consideration recited in the deed, namely, that the property was paid for with money belonging to Mrs. Leete, and, therefore, her property. To the extent that the property was paid for by Leete's money it was not her property at law or in equity. That the property in question was conveyed to Simmons for the purpose of placing it out of the reach of creditors, and not for the purpose of paying a debt due to the wife, is we think clear. Such a transaction could not stand as against creditors when made between two persons not sustaining the marriage relation, and it ought not to stand as against the creditors when made between husband and wife, except to the extent that the wife's money paid for the property.

The judgment of the circuit court setting aside the deed to Simmons to the extent of six hundred and twenty-four-thousandths must be modified so as not to include the homestead right. That modification will be made here. In all other respects the judgment is affirmed. Each party will pay half of the costs in this court. BARCLAY, J., not sitting, the other judges concur.

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THE STATE *ex rel.* SANDERS V. BLAKEMORE.

DIVISION ONE.

1. **Office, Resignation of.** An officer has the right to resign his office.
2. **Clerk of Court: SUSPENSION: RESIGNATION: APPOINTMENT BY GOVERNOR.** Revised Statutes of 1879, section 630, provides that a court may suspend its clerk for misdemeanor in office until a trial can be had, and may appoint a temporary clerk who "shall continue in office until the regular clerk shall resume his office or a successor shall be elected." Section 615 provides that when any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal or otherwise, the governor shall appoint some eligible person, who shall discharge the duties of the office until the next general election, at which time a clerk shall be chosen for the remainder of the term. *Held* that after the appointment of a temporary clerk by the court the resignation of the suspended clerk did not create a vacancy to be filled by the governor.

Quo Warranto.

WRIT OF OUSTER DENIED.

John M. Wood, Attorney General, and *Hough & Hough* for relator.

(1) The right to resign an office is universally recognized; the only doubt ever existing in the matter was as to the necessity of acceptance by the appointing power, to make the resignation complete. Const., art. 14, sec. 4. In this case, there are both the resignation and acceptance. (2) The suspension of Bragg created no vacancy in the office of circuit clerk, and no act of the circuit court short of a removal could create a vacancy within the meaning of the law. Bragg's removal, if he had been tried and convicted, would have created a vacancy. R. S. 1879, secs. 615, 3337. But

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neither Blakemore's death, nor suspension, nor removal, would have created a vacancy. Bragg, therefore, was the real clerk in the eyes of the law, although temporarily divested of his functions; he alone had the commission of the governor. His death or removal could create a vacancy under section 615, *supra*. Why then could not his resignation create a vacancy? Construing the two sections, 615 and 630, together, as they must be construed, the temporary clerk will perform the duties of the office until the regular clerk resumes his duties, or until his successor is elected, unless, in the meantime, the regular clerk should die, resign or be removed; in which event the governor has authority, by section 615 (1964) to appoint his successor. (See the opinion of THOMPSON, J., in *State ex rel. Sanders v. Blakemore*, 40 Mo. App. 406.) (3) But it may be urged that Bragg could not resign, because his resignation would prevent the court, in the event of conviction, from imposing the penalty prescribed by law, a part of which is removal from office. We answer, that the jurisdiction of the court would not be ousted by his resignation, and a fine could still be imposed upon him, and perhaps a judgment of removal could be rendered, though the latter would be unnecessary. Opinion of Senators Frelinghuysen and Ingalls and Edmunds in the *Belknap Case*, 7 Congressional Records, part 7; 24 Meyers' Federal Decisions, title "officers," bottom page 117; *The Bark Laurens*, U. S. District Court of New York, where this question is expressly adjudicated. Precisely the same result would follow, and the same imaginary difficulty would arise, in the case where the term of office should expire before the trial and conviction of the alleged delinquent. The court would not be ousted of its jurisdiction either by reason of the resignation of the officer or the expiration of the term of office. This was expressly decided in *Hunter v. Chandler*, 45 Mo. 452. (4) Bragg, the regular clerk, having resigned, and his resignation having been accepted by

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the governor, and the governor having appointed and commissioned the relator, Sanders, to fill the vacancy occasioned by the resignation of Bragg, and Sanders having qualified as required by law, and demanded possession of the office, Blakemore was not thereafter entitled to hold the same, and the demurrer should be sustained, and judgment of ouster should be rendered against the respondent. High on Ex. Rem. [Ed. 1884] sec. 754; *Hunter v. Chandler*, 45 Mo. 452.

James Carr and *J. A. Carr* for respondent.

(1) Bragg, the regular clerk, could not resign the office in question while he was suspended from the performance of the duties thereof on charges of misdemeanor in office. R. S. 1879, sec. 630; *Hunter v. Chandler*, 45 Mo. 455; *Edwards v. United States*, 103 U. S. 471; *Thompson v. United States*, 103 U. S. 480; *Groves v. Slaughter*, 15 Pet. 449; *United States v. Bevans*, 3 Wheat. 336; *Railroad v. Buchanan Co.*, 39 Mo. 485. (2) If it shall be held that he could resign, then his resignation while suspended as aforesaid did not create a vacancy in said office, so as to authorize the governor to appoint the relator to fill such vacancy, notwithstanding the respondent was at the time of said appointment legally in the office performing all the duties thereof. R. S. 1879, sec. 630; *State, etc., v. Police Commissioners*, 14 Mo. App. 297; s. c., 88 Mo. 144; *State, etc., v. Macon County Court*, 68 Mo. 29; *State, etc., v. Harrison*, 113 Ind. 438; *Lindell v. Railroad*, 36 Mo. 583; *State ex rel. v. McAdoo*, 36 Mo. 453; *Bank v. Francklyn*, 120 U. S. 747. Appointment to office by the governor is not the same thing as an election by the qualified voters. *Speed v. Crawford*, 3 Met. (Ky.) 207; *Gosman v. State*, 106 Ind. 206.

BRACE, J.—This is an original proceeding in this court by information in the nature of *quo warranto* to oust the respondent from the office of clerk of the circuit

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court of Dunklin county. The case stands on demurrer to the return to the original writ.

It appears from the return that on the fifth day of December, 1888, the judge of the circuit court of Dunklin county suspended William G. Bragg, Jr., the clerk of said court, from office, on charges of misdemeanor in office, and appointed the respondent temporary clerk of said court, who thereupon qualified and entered upon the discharge of the duties of said office and remains in possession of the same. Pending said charges, and two indictments found against Bragg by the grand jury for such misdemeanors in office, he, on the twenty-second of January following, tendered his resignation of said office to the governor, who, in entire ignorance that said charges and indictments were pending against said Bragg, accepted said resignation, and on the same day appointed the relator to said office.

The suspension of Bragg and the appointment of the respondent by the judge was by virtue of the following clause in section 630, Revised Statutes, 1879: "When any court or the judge, or a majority of them in vacation, shall believe from their own knowledge or from the information of others, on oath or affirmation, that the clerk of the court in which they preside has been guilty of a misdemeanor in office they shall give notice thereof to the attorney general or prosecuting attorney, stating the charges against such clerk and requiring him to prosecute the same; and they may suspend such clerk from office until a trial can be had, and appoint a temporary clerk, who shall possess the same qualifications, take the same oath and give like bond as other clerks, and who shall possess the same power, perform the same duties and receive the like fees as other clerks, and shall continue in office until the regular clerk shall resume his office, or a successor shall be elected." Section 635 of the same act provides that, if the clerk against whom the charges are preferred shall be found guilty thereof, he shall be removed from his

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office and be fined ; and section 636 provides that, if he be acquitted, he shall be reinstated in his office. Section 614 of the same act provides that the clerks of all courts of record, except the supreme court and St. Louis court of appeals, and except as otherwise provided by law, shall be elected by the qualified voters for a term of four years.

The respondent contends that by virtue of his appointment, qualification and entering upon the discharge of the duties of said office under the provisions of this act he is entitled to remain in the discharge of the duties, and in the receipt of the emoluments thereof, until either the regular clerk, being reinstated, shall resume his office or "a successor shall be elected ;" that, as neither of these contingencies had happened, he is in lawful possession of the office, and plaintiff's action cannot be maintained.

The relator contends that Bragg, being the regular clerk of said court, had the right to resign his office and that, the governor having accepted his resignation, said office became vacant, and as by section 615 of the same act it is provided that, "When any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal, refusal to act or otherwise, it shall be the duty of the governor to fill such vacancy by appointing some eligible person to said office who shall discharge the duties thereof until the next general election, at which time a clerk shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified, unless sooner removed," the governor having appointed and commissioned relator clerk of said court, and he having duly qualified as such, he is the lawful clerk of said court and entitled to the possession of said office, its powers and emoluments.

There has never been any question in this country but that a civil officer has a right to resign his office ; he had that right at common law and it is recognized in

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our constitution. The only contrariety of opinion upon the subject has been as to whether an acceptance was necessary to give it complete effect. As the resignation in this case was accepted it is not necessary to enter into that discussion. We have been able to find no case, and upon principle we can see no reason why, although suspended from the performance of the functions, he may not resign whatever right he may have in and to the office to which he holds the commission. But by such resignation he could not avoid the consequences of any misfeasance while in office, or deprive another of any right the law may have conferred upon him in respect of such office. The resignation of Bragg and its acceptance by the governor did not *ipso facto* confer upon the latter the power to appoint the relator to the office. A *vacancy* must occur by the resignation in order to confer such power. "There is no technical nor peculiar meaning to the word 'vacant.' * * * it means empty, unoccupied, as applied to an office without an incumbent; * * * an existing office without an incumbent is vacant." *State ex rel. v. Boecker*, 56 Mo. 21; 7 Ind. 326; 7 Col. 605. "An incumbent of an office is one who is legally authorized to discharge the duties of that office." 10 Am. & Eng. Ency. 361; *State v. McCollister*, 11 Ohio, 46.

When Bragg resigned the relator was in possession of the office, legally authorized to discharge its duties. No vacancy occurred by such resignation, and he had the right to continue in the discharge of those duties unless the effect of the appointment of the relator made in pursuance thereof was to terminate the authority of the respondent to thereafter discharge those duties. To have this effect the relator must be the *successor elected* to that office, within the meaning of section 630, *supra*; and this brings us to the real question in the case, which turns upon the meaning of the phrase "until a successor shall be elected," as used in that section, until which time the respondent by virtue of his

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appointment is lawfully authorized to discharge the duties of the office.

The rule prescribed for the construction of all statutes in this state is "that words and phrases except technical words and phrases having a peculiar and appropriate meaning in law shall be taken in their plain, ordinary and usual sense," unless "plainly repugnant to the intent of the legislature or of the context of the same statute." R. S. 1879, sec. 3126.

It will be readily conceded that the plain, ordinary and usual sense of the phrase in question is "until some person is elected by the qualified voters to succeed." The relator contends, however, that the phrase is not to be literally construed, but the sense is "until a successor is elected *or appointed*," and that such construction is necessary in order to bring section 630, *supra*, into harmony with section 615, *supra*, of the same act, by virtue of which he claims the office in this action.

This idea is founded upon the mistaken assumption that the death, resignation or removal of the regularly commissioned clerk must in all cases, and *ipso facto*, create a vacancy which the governor is authorized by section 615 to fill. This is not true, and in fact is an assumption of the very question in dispute. While ordinarily a vacancy will be the result of such events, as we have already seen, it is not the inevitable result of them. Before either of these events occurs the office may have gone into the hands of one, who by law is entitled to hold it until a successor is elected, which is the case in hand, and in which case there is no vacancy to be filled by appointment.

It is also assumed that, a vacancy having occurred by the happening of one of these events, the governor is authorized to appoint *a successor* to the clerk who shall have resigned, died or been removed. Section 615 confers no such power on the governor; it provides for the election of a successor, and for the appointment of

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some eligible person by the governor "who shall discharge the duties of the office until the next general election at which time *a clerk shall be chosen for the remainder of the term*, who shall hold his office until *his* successor is duly elected and qualified." The person *appointed* is a mere *locum tenens* until *a clerk* can be *elected* to succeed and fill out the term of the one who has resigned, died or been removed.

Section 11, article 5, of the constitution has nothing to do with the case. It is provided by the act under consideration how vacancies in the office of clerks of courts of record shall be filled. Both of the sections under consideration contemplate that the service of the office of circuit clerk is to be performed by a citizen who has been thereto duly elected for a term of years, and until his successor is elected as provided for in section 614. These sections were enacted to meet contingencies that might happen by reason of which such service could not be performed by the elected clerk until his successor should be elected; neither section undertakes to provide for the appointment of such successor but to make a temporary provision until such successor can be elected. Section 615 authorizes the governor in case of *vacancy* caused by death, resignation, removal, refusal to act or otherwise to appoint some eligible person to discharge the duties thereof until the next general election when *a clerk* is to be elected for the remainder of the term, and until his successor is elected and qualified.

Section 630 undertakes to provide for another and a different contingency, for a case *in which a vacancy has not occurred*, but in which the clerk by reason of alleged misdemeanor in office ought not to be permitted to remain in the discharge of its duties, and, therefore, is suspended by the court or the judge thereof of which he is clerk; in which case the court or judge suspending him is authorized to appoint some qualified person to discharge the duties of the office, who shall continue

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in office until the regular clerk shall resume his office, or a successor shall be elected. If the regular clerk die, resign or is convicted and removed under section 635, and, therefore, cannot resume his office, then the appointee of the court shall continue in office, not until another temporary clerk is appointed by the governor, but until a successor of the clerk shall be elected. This is the plain letter of the statute. The words "elect," "appoint" and "successor" are used in both sections, and evidently, in their ordinary and usual sense in each, and when the difference in the cases provided for by the two sections is rightly considered, we do not find it necessary, in reading them together, to attach any other than the usual meaning to either of these words or the phrases in which they are used in order to render the sections harmonious; nor do we find that such sense renders these two sections repugnant to each other or section 630 repugnant to the provisions of any other part of the act.

That the legislature mindful of their duty to guard against failure of the public service literally meant just what they said in regard to the term of office of the appointee in section 630 is supported by other considerations. The office of circuit clerk is a very important one, requiring skill and ability; he is *ex officio* recorder of deeds for his county; the duties of the office require continuous daily attention during business hours, and the law is that he personally devote his time to, and give bond for, the faithful performance of those duties.

It is obvious that, in order to obtain a suitable person to properly discharge the duties and assume the responsibility of this important branch of the public service, the inducement of as reasonable and certain a term of office as the nature of the case will admit should be offered him. Capable men usually have business of their own, requiring their attention, and it could not reasonably be expected such a man would give up his business and enter upon the discharge of

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the exacting and onerous duties of this office, requiring daily his personal service, execute a reliable bond for their proper discharge, and assume the grave responsibility of such office, with a tenure thereof that might be terminated the next day, week or month, by the interest, whim or caprice of another, who according to the relator's construction of the statute could at any moment resign him out of office. The reason as well as the letter of the law is against such a construction, and there can be no doubt that the meaning of the legislature is that the appointee of the court or judge, under section 630, "shall continue in office * * * until a successor shall be elected" as they have therein in plain and unmistakable language expressed it. The demurrer will be overruled and the writ denied. SHERWOOD, C. J., and BLACK, J., concur.

SPRAGUE *et al.* v. ROONEY *et al.*, *Appellants.*

DIVISION ONE.

1. **Married Woman: SEPARATE ESTATE.** A married woman can deal with her equitable separate estate as a *feme sole*.
2. **Contract: PAROL EVIDENCE: ILLEGAL CONSIDERATION.** A contract, under seal, in the form of one for sale of land, may, in a suit for specific performance, be shown by parol evidence to be in fact a lease, made in violation of the statute, against letting premises for bawdy-house purposes. (*Overruling Sprague v. Rooney*, 82 Mo. 498.)
8. — : — : **PLEADING.** Such parol evidence was admissible under the general denial of the answer.

Appeal from Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED AND REMANDED.

104 349
51a 45
53a 382

104 349
55a 521
56a 20

104 349
o140 182

104 349
143 248

104 349
145 304
1151 573
78a 592

104 349
158 523

104 349
167 287
167 403

104 349
97a * 38
o97a * 39
98a * 699

104 349
102a * 705

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William Parmalee for appellants.

(1) Mrs. Rooney at time contract was entered into with Bessie Sprague was a *feme covert*, and under the decision in *Martin v. Colburn*, 88 Mo., page 229, her husband must join her in making a conveyance of her separate estate; yet it must not be forgotten that she did not have the "*jus disponendi*" of this property; the trust was created for her heirs as well as her, and she must comply with the conditions of the deed before the trustee would have been warranted in conveying. In this case Mrs. Rooney has neither complied with the provisions of the deed, nor has she complied with the law of the state respecting conveyances. Mrs. Rooney never received the monthly payments as a part of the purchase price of the premises. She received the money as rent, treated the contract as a lease, and for that reason refused to convey, or direct the trustee, in writing or otherwise, to do so; therefore, doctrine of estoppel will not apply. (2) The decision of this court in this case reported in 82 Mo. 493, is not in accord with any decision we can find on this subject. The following cases say that all contracts, in whatever form made, for the purpose and with the intention of furthering an illegal subject, are void. *Brud's Appeal*, 55 Pa. St. 299; *Guenther v. Dewein*, 11 Ia. 133, 135; *White v. Buss*, 3 Cush. 448; *Reynolds v. Nichols*, 12 Ia. 402, 403; *Fowler v. Scully*, 72 Pa. St. 467; *DeGroot v. Van Duzer*, 20 Wend. 390.

Junius W. Jenkins and *Charles W. Clark* for respondents.

(1) The estate of Mrs. Rooney in the land being an equitable separate one, it was not necessary for her husband to join in the conveyance of the land. *Turner v. Shaw*, 96 Mo. 22. (2) The contract of sale could not be converted into a lease by parol evidence. This was decided on the former appeal. 82 Mo. 493.

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When a case is the second time in this court, only such questions will be noticed as were not determined in the previous decision; whatever was passed upon will be deemed *res adjudicata*, and no longer open to dispute or further controversy. *Overall v. Ellis*, 38 Mo. 209; *Bank v. Taylor*, 62 Mo. 338.

SHERWOOD, P. J.—This cause has been here before, and reported in 82 Mo. 493. It is and was an equitable proceeding for specific performance of the following contract:

“This article of agreement entered into this twentieth day of February, 1878, by and between Catherine of the one part and Bessie Stevenson, of the second part, witnesseth: That the said Catherine has this day bargained and sold, to said Bessie Stevenson for the sum of \$2,500, the following real estate lying and being in the city of Kansas, county of Jackson, state of Missouri, namely: Lot number 11, block 3, Lykin's addition to the City of Kansas, old town, as the same appears on record of the recorded plat of said addition, upon the following terms and conditions, to-wit: The said Bessie Stevenson to pay the sum of \$25 per month, payable monthly, on the twentieth day of each month, until the sum of \$1,000 is thus paid, then the said Catherine Rooney to execute and deliver to the said Bessie Stevenson a good and sufficient warranty deed to the same, taking the notes of said Bessie Stevenson, secured by deed of trust on the property conveyed, for the same deferred payments. But if said Bessie Stevenson fail or refuse to make any monthly payments as herein provided, until deed made, her rights under this agreement to cease, and said Catherine Rooney to be immediately entitled to the possession of said real estate.

“In witness whereof the parties have set their names and affixed their seals to duplicate copies hereof, one to be retained by each, the day and year aforesaid.

“[Seal.]

MRS. CATHERINE ROONEY,

“[Seal.]

MISS BESSIE STEVENSON.”

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The defense then made in effect was that the contract, though in form a *sale*, yet was in reality a *lease*, drawn in the form of a sale in order to evade the statute respecting the leasing of premises for a bawdy-house ; for which purpose the then plaintiff intended using it.

A replication put in issue the allegations of the answer, and on the hearing the issues were found in favor of the defendant, and judgment accordingly, but on appeal to this court that judgment was reversed and cause remanded. When the cause reached the lower court again, however, the answer and defense were changed ; the former consisting of a general denial, and an allegation, that, at the time the contract mentioned was made, Catherine Rooney was a married woman, etc., and hence that contract was void, etc., etc. A reply was filed to this answer setting forth that Catherine Rooney, though a married woman, had an equitable separate estate in the property in controversy, etc., etc.

By agreement of parties, the testimony of Catherine Rooney, taken at a former trial, but who had died in 1884, as well as that of Bessie Sprague taken at the same time, might be read in evidence, by either party, subject only to objections for irrelevancy or incompetency.

Pursuant to this stipulation, the plaintiff introduced in evidence a portion of the testimony of Bessie Sprague, as follows : "I am the plaintiff in this case ; I know the defendant, Catherine Rooney, and have known her several years. I am acquainted with the property in controversy in this suit. In the month of February, 1878, and a short time prior to the twentieth day of that month, I went to see Mrs. Rooney about renting the property in controversy. I saw her at her house in Kansas City. I told her I would like to rent the house that I had heard she had offered to rent it to Mollie Wilson for \$15 a month, and that I would like to rent it if I could get it on reasonable terms. Mrs. Rooney then asked me why I did not buy the property. I

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answered that I had not thought of buying the property, as I did not have money to pay for it. She said that she would sell it to me on such easy terms that I could pay for it. I asked her on what terms, and she said for \$2,500, and that I could pay her \$25 per month until I had paid her \$1,000, when she would give me a deed to the property, and I could then secure the balance of the money to her by a deed of trust on that property. She urged me to do this, and said if I bought it it would then be mine. I told her I would take the property, as I thought I could pay for it on those terms, and she would have the contract between us drawn up, so that we could sign it the next time I came. I called to see her again in a day or so, I cannot remember exactly how long it was, and we signed the contract sued on in this case. I paid her the first installment of \$25 on the twentieth of February, 1878, and took possession of the property, which I have retained ever since, either myself or tenant. When I took possession of the property it was in very bad repair. Many of the window lights were out, a great many of the keys and door latches were gone ; some of the plastering off and one or two doors down. Before moving into the house I had it repaired by putting in the window lights and fixing the plastering, hanging the doors and fitting them with keys and latches, and by preparing two of the rooms. I have since that time had the premises repaired on several occasions and have made a number of improvements, all of which have been paid for by me. I have twice had the house painted, a part of it twice papered. I had a partition built across one of the rooms, thus converting it into two rooms. I had a window put in the south side of the house. I had the kitchen repaired, and the floor taken up and brick laid under it to keep the rats out. I had a new pump put in the cistern. I had a new bridge put at the approach to the house from the front ; and I had a new front put into the house. The

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repairs and improvements altogether cost at least \$450. All of which was paid for by me. Mrs. Rooney made no repairs or improvements on the property since the contract was made."

Plaintiff then read in evidence the following portion of the testimony of Catherine Rooney: "I am one of the defendants in this case, and am acquainted with plaintiff. In the month of February, 1878, I owned the property in controversy. The property was vacant and unoccupied by a tenant. After we had made this agreement I had my husband, John Rooney, write the paper on file with the petition, which on or about February 20, 1878, was signed by myself and plaintiff; and she paid me \$25 and took possession of the property."

The defendants also offered in evidence the following portion of the testimony of Catherine Rooney: "I am one of the defendants in this case, and am acquainted with the plaintiff. In the month of February, 1878, I owned the property in controversy; the property was vacant and unoccupied by a tenant. The plaintiff about that time came to me to rent said property. She had lived in the house as my tenant before. I agreed to rent her the house at \$25 per month, payable at the twentieth day of each and every month in advance; \$25 was a reasonable rent for the house at that time. I knew that plaintiff wanted said house for the purpose of being used or kept as a brothel or bawdy-house. She told me she expected to keep some girls. I knew the statutory penalty for leasing or renting a house for such purposes, and in order not to incur the pains and penalties of the law, and to keep from being indicted, I did not execute and deliver a lease of the premises to the plaintiff; but the plaintiff and I agreed that our contract should be drawn up in the shape of a sham sale. The contract was never intended to be a sale of the property, as it purports to be on its face, but was made for the sole purpose of evading the law against

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knowingly leasing a house for the purpose of being used or kept as a bawdy-house or brothel. I have paid the taxes on said property ever since said contract was made, and have been collecting rent from one Clara Despain, who now occupies said premises, since about August 20, 1881. I have also kept the property insured. I was to keep the premises in repair and I did keep them in repair. * * * Nobody except the plaintiff, myself and *God Almighty* were present when I signed the contract sued on, or at any time of the conversations between us respecting the property before the contract was signed. I did not want anyone to know the nature of the transaction. When plaintiff rented the property of me before, she left before the end of the first month, and returned the keys and contract to me and said she was going away because she was unable to furnish the house; \$25 a month was a fair rental for the property at that time.

"I had previously rented it for that, except in the grasshopper times. I have made improvements on the property since February 20, 1878. I had a bridge built which leads from the street to the house, across a kind of a gully or ravine, which I paid for. I cannot say how much I paid for it, as the man who did the work took it out in board, but it was about \$6. Plaintiff did not have the bridge built to which I have referred. I had it built, and paid for it myself. I was not a frequent visitor at the plaintiff's house, but have been there several times."

This testimony was received by the court subject to the objection of plaintiffs.

The defendants then introduced in evidence another portion of the testimony of Bessie Sprague as follows: "I have been the keeper of a brothel or bawdy-house, and I went to Mrs. Rooney to get this property for that purpose, and I did keep a brothel there after I got it. Mrs. Rooney did not ask me whether I intended to keep a bawdy-house. I would have considered it an

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impertinent question from her, as she knew the kind of a woman I was. I went to see Mrs. Rooney about renting the house because I had heard that she had been trying to rent it to Mollie Wilson for \$15 per month. I did rent the rooms from Mrs. Rooney once before, I think about November, 1877, for \$25 per month. I then paid my rent in advance and took possession and left in about two weeks, because I found I could not pay that rent, and had an opportunity to get a cheaper house. The contract between us was in writing. I don't know that I ever read the contract that we had between us at that time. I left the house in about two weeks, and turned over the contract and keys to Mrs. Rooney. I was anxious to get the house and paid but little attention to the writing. My impression is, however, that the writing was similar in its provisions to the one sued on. Mrs. Rooney said at the time that in order to keep herself from being indicted she would have the contract between us fixed in the shape of a sham sale, which I supposed she did. I, therefore, think that that contract was similar to this one to the extent of its appearing to be a sale. Whether or not it was similar in all its provisions I cannot say. I don't know whether Mrs. Rooney had the contract sued on copied from that or not. The real contract in November, 1877, was that I was to rent the property at \$25 per month payable in advance. It is not a fact that the real contract sued on at the time it was signed was a renting at \$25 per month. Mrs. Rooney sold me the property just as the contract states, and it was so understood between us. I never heard anything to the contrary until I had paid her the thousand dollars, and she refused to make me the deed. I never paid any taxes on the property; I didn't suppose I had to pay any taxes on the property until I got my deed."

It was also shown by plaintiffs that Bessie Sprague had fully complied with the contract aforesaid by the payment of \$1,000 to Mrs. Rooney, and by the tender to

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her of the contemplated notes and deed of trust; but she refused to receive them or to make a deed to Bessie Sprague.

It was also shown that Catherine Rooney, although a married woman, had an equitable separate estate in the litigated premises. Other facts appear of record, but it is unnecessary to state them, owing to the views taken of those already stated.

I. Catherine Rooney, although a married woman, yet, being possessed of an equitable separate estate in the litigated property, had as much capacity to deal with that property as if she had been a *feme sole*. *Turner v. Shaw*, 96 Mo. 22, and *cas. cit.*

This being the case, the fact that Catherine Rooney was a married woman at the time she executed the contract in controversy raises no barrier whatever, in and of itself, to the success of the plaintiff in the present proceeding. There are other considerations, however, respecting that contract, which have a more important bearing as to the force and effect of that instrument considered with reference to the facts disclosed by this record.

II. Section 3816, Revised Statutes, 1889, which corresponds with section 1551, Revised Statutes, 1879, provides that "every person who shall knowingly lease or let to another any house or other building * * * for the purpose of being used or kept as a * * * brothel, or bawdy-house, shall, on conviction, be adjudged guilty of a misdemeanor and punished by fine not exceeding \$500."

A preceding section also makes it a misdemeanor for any person to keep a bawdy-house or brothel. Sec. 3811.

Under these statutory provisions and prohibitions there can be no doubt that a lease made in violation of such statute cannot be enforced. And, at common law, a bawdy-house is a common nuisance *per se*. *Clementine v. State*, 14 Mo. 112. And "to conduct such a

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place, or to lease property for such a purpose, is a public wrong." *Givens v. Van Studdiford*, 86 Mo. 156. In *Ashbrook v. Dale*, 27 Mo. App. 649, it was ruled that a contract to rent a house to be used as a brothel is illegal, and no recovery can be had on such contract, or on an implied contract, for such leasing.

If there be one principle of the law well settled it is this: That a contract, expressed or implied, based on an illegal consideration, whether that consideration appear on the face of the contract or be proved *aliunde*, cannot be enforced either at law or in equity; that the moment the illegality of the contract is disclosed the gates of legal and equitable relief and remedy are at once shut against the party who seeks to enforce such a contract. Nor is it necessary that such contract, when it violates the provisions of a statute, should be declared void by that statute in order that the courts should refuse to enforce it, when relief based upon it is asked at their hands. These positions are sustained, perhaps, by as great an array of authorities as is to be found on any other one topic of the law.

Thus in the case of *Bank v. Owens*, 2 Peters, 538, JOHNSON, J., said: "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country; how can they become auxiliary to the consummation of violations of law. * * * There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." The same principles are recognized in *Coppell v. Hall*, 7 Wallace, 558. Justice SWAYNE, commenting on the instruction of the court below, that the illegality had been waived by the act of the defendant, says: "In such cases there can be no waiver. The defense is allowed not for the sake of the defendant, but of the law itself." Again, "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the

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defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation." In *Mitchell v. Smith*, 1 Binney, 110, a case of the sale and purchase of a Connecticut title to Pennsylvania lands, SHIPPEN, C. J., says: "The contract is illegal, being founded on the breach of the law, and of consequence a void contract, and cannot be enforced in a court of law."

In *Seidenbender v. Charles*, *Adm'r*, 4 S. & R. 151, it was held there could be no recovery upon a ticket in an illegal lottery. TILGHMAN, C. J., said: "I consider it perfectly settled, that an action cannot be sustained, founded on a transaction prohibited by statute, although it is not expressly declared that the contract is void." P 160. YEATES, J., said: "The principle of public policy is, that no court will lend its aid to a man who grounds his action upon an immoral or illegal act. Justice as between these individuals would require either payment of the money or reconveyance of the property; but principles of public convenience demand that the justice of the case shall yield to higher considerations, the operation of the precedent on public morals, and the public interest. It is for these reasons courts of justice will not assist an illegal transaction in any respect." To the same effect see *Fowler v. Scully*, 72 Pa. St. 456; *Brua's Appeal*, 55 Pa. St. 294; *De Groot v. Van Duzer*, 20 Wend. 390; *Reynolds v. Nichols*, 12 Iowa, 398; 2 Kent's Com. [13 Ed.] 466, and *cas. cit.*; *Sumner v. Summers*, 54 Mo. 340; *Cheltenham v. Cook*, 44 Mo. 29; *Kitchen v. Greenabaum*, 61 Mo. 110.

In *White v. Bass*, 3 Cush. 448, SHAW, C. J., said: "It is well settled by the authorities, that any promise, contract or undertaking, the performance of which

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would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void, and will not maintain an action. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect, and in this respect the law gives no countenance to the old distinction between *malum in se* and *malum prohibitum*. That which the law prohibits, either in terms or by fixing a penalty to it, is unlawful; and it will not promote, in one form, that which it declares wrong in another."

And it does not at all alter the principle to be applied in such cases, because the instrument declared on is in *one form*, while the statute levels its denunciations and penalties at an instrument in *another form*. The law looks at the *substance* of things; not at their *shadows*. To say that the law prohibits a *lease* being made of a house to be used as a bawdy-house, and that the courts will refuse to enforce *such* a contract; but that if such contract takes on the form of *deed or contract of absolute sale*, that then the courts would have to enforce such a *subterfuge*, is unsustained by either reason or authority, and at war with both.

In this case the evidence, which was entirely competent for that purpose, tends very strongly to show the illegality of the contract aforesaid. In such case, such evidence is not introduced to "*vary or control the contract*;" but to show that in contemplation of law, in consequence of the proven illegality, *no contract at all ever had an existence*; that it was void *ab initio*. 2 Parsons on Cont. [6 Ed.] 554; 1 Greenl. Ev. [14 Ed.] sec. 284, and cas. cit. The case of *Sprague v. Rooney*, *supra*, is opposed to this view, but, that case being without support in reason or precedent, we overrule it.

III. But one point remains for discussion, and that assumes the form of a question: Under the general denial in the answer was the testimony aforesaid admissible? The answer to this must be in the affirmative. The effect of that portion of the answer referred

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to was to deny that there was any *legal* contract in existence, and, therefore, that plaintiffs had no standing in court. Bliss on Code Plead. [2 Ed.] secs. 324-352; *Northrup v. Ins. Co.*, 47 Mo. 435; *Greenway v. James*, 34 Mo. 328; *Corby v. Weddle*, 57 Mo. 452; *Young v. Glascock*, 79 Mo. 574.

IV. This cause was evidently heard and determined under the influence of the erroneous ruling made when it was here before. In order that it may be reheard and determined under more favorable auspices, and upon a correct theory of the law, we reverse the judgment and remand the cause. All concur.

SEPARATE OPINION.

BARCLAY, J.—It appears to me that the evidence referred to in the opinion of the learned chief justice was admissible as tending to show that the so-called agreement of sale, though in writing, never acquired original vitality as a contract, because of illegality (for which, it is claimed, it was a cover) in the real transaction between the parties.

Such evidence is not regarded as infringing the general rule excluding verbal testimony to contradict or vary a writing. *Tracy v. Union Iron Works Co.*, 104 Mo. 193.

In my opinion it was admissible under the pleadings in this case. For these reasons my concurrence is given to reversing and remanding.

MACKLIN V. SCHMIDT *et al.*, Appellants.

DIVISION TWO.

The Title to the Land in controversy in this case having been passed on in *Macklin v. Allenberg*, 100 Mo. 337, and no reason appearing for disturbing the ruling therein, the judgment in that case is affirmed.

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141	120
104	361
e94a	214

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Appeal from St. Louis City Circuit Court.—HON. J. A. SEDDON, Judge.

REVERSED AND REMANDED.

D. T. Jewett for appellants.

T. J. Rowe for respondent.

GANTT, P. J.—This is an action of ejectment for the possession of a lot of land and improvements thereon in St. Louis, situated on the north line of Madison street, twenty-three feet front and one hundred and seven feet and six inches deep.

Patrick Macklin, the father of the plaintiff, is the source of title under which plaintiff and defendants claim, so no controversy is made as to his title. The plaintiff claims under a chain of deeds, starting from said Patrick Macklin. The defendants do not deny but what said deeds were made and recorded as they purport to have been. Therefore, under said deeds, the plaintiff makes out an apparent chain of title. But none of those deeds, except the one by Macklin and wife to her trustee, dated May 13, 1873, antedates the chain of title under which defendants claim.

On the thirteenth day of May, 1873, Patrick Macklin and wife conveyed said land to L. Haydell, as trustee, for the sole use and benefit of Mrs. Ann Macklin, wife of said Patrick. On the ninth of December, 1873, one Ferguson recovered a judgment for debt against said Patrick Macklin, upon which execution was issued, and the sheriff of St. Louis county seized said land on said execution and sold it at auction, in due form of law, on the seventeenth day of February, 1874, to Michael Kinealy. The sheriff's deed to Kinealy was duly recorded in St. Louis city and county on the twenty-third day of February, 1874. On the same day (February 23, 1874), Michael Kinealy commenced an

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action in his name in the St. Louis circuit court against said Patrick Macklin, his wife, Ann, and her trustee, F. L. Haydell, averring fraud and want of consideration in said conveyance of Macklin and wife to her trustee, Haydell, and asking to have said conveyance declared null and void, and to have the same set aside and the title to said land vested in him, said Kinealy, by virtue of his purchase of the same under said sheriff's sale and deed. The suit was entered at the April term, 1874, of said court, and, on the same day, it was commenced, a notice of the same was duly filed in the recorder-of-deed's office in St. Louis, and duly recorded. A copy of these papers is in the record of the case.

Said suit was prosecuted in said circuit court to final judgment, and, on the eleventh day of October, 1878, a judgment was rendered by said court in favor of said Kinealy and against said Patrick Macklin and wife and her said trustee, Haydell, by which judgment and decree the said deed made by said Patrick Macklin and wife to said Haydell, on the thirteenth of May, 1873, was declared "to be null and void, and of no effect against said Kinealy, and that all right, title and interest or estate which the defendants had or claimed to have on the ninth of December, 1873, be and was thereby vested in said Kinealy, and that said Kinealy be put in possession of said lands, and that a writ of possession issue for that purpose." A copy of this decree was filed and recorded in the registry of deeds for St. Louis on the twenty-ninth of January, 1879, and a copy of the same is in the record.

A bill of exceptions was filed and allowed on the twenty-fourth of November, 1878, but no appeal was ever taken or allowed at any term of said court.

On the tenth of December, 1878, after the term of the court at which judgment was rendered had elapsed, a writ of possession was taken out, and on the first day of February, 1879, the sheriff formally delivered possession of said property to Michael Kinealy; a copy of

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the execution and officer's return thereon are in the record.

On the fifth day of March, 1879, Michael Kinealy borrowed of defendant Sanderson the sum of \$2,000, and gave his deed of trust on said property to secure the payment of the same in three years, with interest notes. J. W. Sutherland, as agent of the Sandersons, loaned the money, and was trustee in the deed. The deed of trust was recorded on the eighth of May, 1879. A copy of the deed is in the record.

Kinealy failed to pay the principal note and part of the interest notes, and on the tenth day of May, 1883, the said trustee, having duly advertised the same, sold said property at auction to Mrs. M. A. Sanderson, one of the defendants, and wife of defendant, Dr. Sanderson. Said trustee's deed was duly executed on the nineteenth of May, 1883, and recorded in the city of St. Louis on the twenty-second day of May, 1883. Said deed of trust is in the record. The defendants Sanderson immediately went into possession of the property, by their tenants, and have been in possession from the date of their deed to the present time. This is the defendants' case.

The plaintiff's chain of title claimed is, first, as I have said, a series of deeds, starting from Mrs. Macklin and her trustee, down to the plaintiff, a daughter of Mr. and Mrs. Macklin. But no deed by Mrs. Macklin and her trustee, Haydell, was ever made till long after Kinealy had brought his action and filed his notice of *lis pendens* in the office of the recorder of deeds.

In addition to their chain of deeds, plaintiff puts in evidence the following facts: On the first day of March, 1880, the said Patrick Macklin and wife and her trustee, Haydell, sued out of the court of appeals their writ of error to the circuit court, in the case of Michael Kinealy against said Macklins and Haydell, returnable to the October term, 1880, of the court of appeals. This was more than one year after final

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judgment in the said suit, and one year within a few days after the money had been loaned by defendants to Kinealy. This writ of error was duly prosecuted before the court of appeals, and the judgment of the circuit court affirmed by said court. The defendants, Macklin and Haydell, then appealed from the decision of the court of appeals to this court, which, at the April term of this court, 1886, reversed the judgment of the court of appeals and dismissed the bill. The opinion is found in 89 Mo. 433.

The records of that case, showing the writ of error was sued out, prosecuted, and the judgments and mandate of this court, reversing the judgment of the court of appeals and dismissing the bill, were put in evidence by plaintiff, and are in the records of this case. There was some evidence also put in by each side as to the rental value of the property. The foregoing is all the evidence in the case.

From the foregoing statement, it will be seen that the title to the premises in suit is traced through the same conveyances and decrees that were passed upon and determined by this court in *Macklin v. Allenberg*, 100 Mo. 337. We see no reason for disturbing the conclusion reached in that case, satisfied as we are that it announces the correct rule.

Upon the authority of that case, then, the judgment of the circuit court of the city of St. Louis is reversed, and the cause remanded. All the judges of this division concur.

THE STATE V. BROWN *et al.*, Appellants.

DIVISION TWO.

1. **Criminal Law : INDICTMENT : ROBBERY IN FIRST DEGREE.** It is not necessary to allege, in an indictment for robbery in the first degree, that the putting in fear was done feloniously.

104	365
106	481
104	365
111	583
104	365
119	447
104	365
131	372
131	490
104	365
142	455
104	365
152	541

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2. **Criminal Practice : INSTRUCTIONS : ROBBERY.** It is error for the court to omit the element of felonious intent in its instructions on robbery in the first degree.
3. ——— : ——— : ——— : **FELONIOUSLY.** It is not necessary to use the word "feloniously" in the instructions, but, if used, its meaning should be defined.
4. ——— : ——— : **FELONIOUSLY ROBBERING.** To "feloniously rob" means the taking or removing the money or property of another, *animo furandi*.
5. ——— : **DEFENDANT'S TESTIMONY : INSTRUCTIONS.** Defendants in a criminal case are entitled to have the question of their guilt or innocence submitted to the jury on the facts as testified to by them.
6. ——— : **ROBBERY IN FIRST DEGREE : INSTRUCTION.** An instruction on robbery in the first degree properly stated.
7. ——— : ——— : **ABETTOR.** It is not essential to the conviction of one as an aider or abettor of robbery in the first degree that he received some of the stolen property.
8. ——— : **INSTRUCTION ON DEFENDANT'S EVIDENCE.** An instruction is proper which tells the jury that in determining what weight should be given the defendants' testimony, they *should* consider the fact that they are the defendants. (*State v. Cook*, 84 Mo. 40, and *State v. Young*, 99 Mo. 666, *affirmed*.)
9. ——— : ———. An instruction in a criminal case is proper which tells the jury that the law presumes what defendants said against themselves to be true, but that the jury might believe or disbelieve what they said for themselves.
10. ——— : **PETIT LARCENY.** It is not error for the court, on a trial for robbery in the first degree, to omit to instruct as to petit larceny, where the evidence shows either robbery in the first degree or defendants' innocence.

Appeal from Livingston Circuit Court.—HON. J. M. DAVIS, Judge.

REVERSED AND REMANDED.

Kern & Kemp for appellants.

(1) Robbery is larceny from the person, by violence, or by putting in fear. 2 Bishop, *Crim. Law* [3 Ed.] p. 595; *Long v. State*, 12 Ga. 293; *People v.*

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Nelson, 56 Cal. 77. (2) Larceny is characterized by a felonious intent. *State v. Ware*, 62 Mo. 597; *State v. Shermer*, 55 Mo. 83; *State v. Stone*, 68 Mo. 101. (3) Therefore, in robbery, the taking must be with an intent to appropriate the property as in larceny, with *animo furandi*. *People v. Keefer*, 2 West C. Rep. (Cal.) 878; *Long v. State*, 12 Ga. 293; *State v. Hollyway*, 41 Iowa, 200; *Ward v. Commonwealth*, 14 Bush, 233; *Murphy v. People*, 3 Hun, 114; *State v. Curtis*, 71 N. C. 56; *Jordan v. Com.*, 25 Gratt. 943; 2 Wharton, *Crim. Law* [7 Ed.] sec. 1697; *State v. Broderick*, 59 Mo. 320. (4) The court erred in not submitting to the jury the question of intent in taking the money. *Jordan v. Com.*, 25 Gratt. 943; *People v. Hall*, 6 Park Cr. 642; *Johnson v. Com.*, 24 Gratt. 555. (5) The court should have told the jury to find the taking was done "feloniously," but did not. R. S. 1889, sec. 3530. (6) The court erred in not instructing the jury on all the law arising in this case, and a failure to do so constitutes reversible error, and it makes no difference that such instructions were not asked. *State v. Banks*, 73 Mo. 592; *State v. Branstetter*, 65 Mo. 154; *State v. Palmer*, 88 Mo. 568. (7) The court should have given an instruction on petit larceny. *Com. v. Prewett*, 82 Ky. 404; *State v. Keeland*, 90 Mo. 337; *Kidd v. State*, 83 Ala. 58. (8) The court should have instructed the jury that, if the defendants compelled Ottoman to pay a debt due them, then there was no robbery. *Regina v. Hemmings*, 4 F. & F. 50; *State v. Hollyway*, 41 Iowa, 200; 2 Wharton's *Crim. Law* [7 Ed.] sec. 1697. (9) The court erred in refusing instruction, numbered 4, as asked by defendants in relation to the snatching of property from the hand of another. Snatching property from the hand of another is not robbery. *State v. Texler*, 2 Cap. Law. Rep. 90; 6 Am. Dec. 558; *State v. Willis*, 16 Mo. App. 553; *Shinn v. State*, 64 Ind. 13; *State v. Sommers*, 12 Mo. App. 374; 2 Wharton's *Crim. Law* [7 Ed.] secs. 1701, 1786; 2 Bishop's *Crim. Law* [3 Ed.] p. 597. (10) If

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instruction 4, as asked, was objectionable in phraseology, the court should have given a correct one in relation to that phase of the case, and a refusal to do so is reversible error. *State v. Mathews*, 20 Mo. 55; *State v. Jones*, 61 Mo. 232; *State v. Lowe*, 93 Mo. 571; *State v. Stonum*, 62 Mo. 596. (11) Modifying instruction 4 was a refusal. *Allen v. Mansfield*, 82 Mo. 688. (12) The court erred in refusing instruction, numbered 6, asked by defendants. *State v. Hays*, 23 Mo. 319; *State v. Brooks*, 92 Mo. 555. (13) The court erred in giving instruction, numbered 8, for the state, because it eliminated from the consideration of the jury what defendants said for themselves. They were entitled to what they said for themselves. *State v. Hays*, 23 Mo. 319; *State v. Brooks*, 92 Mo. 555; *State v. Hicks*, 92 Mo. 431. (14) Instruction, numbered 6, for the state, is erroneous. It is based upon Revised Statutes, 1889, section 4218, and is stronger in its terms than is contemplated by that section, and imports an obligation on the jury they "should consider." *State v. Wagner*, 69 Mo. 197; *State v. Zorn*, 71 Mo. 415; *State v. Saunders*, 76 Mo. 35; *State v. McGuire*, 76 Mo. 326; *State v. Banks*, 73 Mo. 592. (15) The instructions for the state fail to tell the jury of what they shall find the defendants guilty. (16) Instructions 3 and 5, given for the state, are erroneous, because they assume that the crime of robbery had been committed, which was a fact in issue. *Robertson v. Drane*, 100 Mo. 273; *Coner v. Taylor*, 82 Mo. 347; *State v. Castor*, 93 Mo. 242. (17) Number 3 is also misleading, because it uses the word "stolen" instead of "taken;" if stolen, then it could only be petit larceny. (18) The court erred in giving instruction, numbered 7, for the state, because there is no evidence to support it. (19) The court erred in not sustaining defendants' motion for a new trial. R. S. 1889, sec. 4208. (20) The defendants' motion in arrest should have been sustained, because the indictment is insufficient, in that it does not charge that the putting in fear was done "feloniously."

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1 Wharton's Prec. and Plead. [3 Ed.] book 4, ch. 4; 2 Archbold's Prac. and Plead., p. 521; Train & Heard's Prec. Ind. 461; *State v. Jenkins*, 36 Mo. 374, where indictment for robbery is approved.

John M. Wood, Attorney General, for the State.

(1) The indictment properly charges the offense of robbery in the first degree. R. S. 1889, sec. 3530; *State v. Davidson*, 38 Mo. 374. (2) The first instruction for the state was essentially in the language of the statute, and unexceptionable. (3) The third instruction for the state is a literal copy of the third instruction given in the case of *State v. Davidson*, 38 Mo. 374. This instruction properly declared the law. *State v. Pratt*, 98 Mo. 482. Every robbery necessarily includes a larceny of the property taken, hence the criticism upon the use of the word "stolen," in this instruction, instead of the word "taken," is without force. Nor is this instruction in any respect misleading, for the jury could not have understood it in any other way than that, if a robbery was committed, the subsequent giving back of the property obtained by means of the robbery did not purge the offense. (4) The fourth instruction for the state is correct. The value of the property is not material. *State v. Howerton*, 58 Mo. 581. (5) The fifth instruction in regard to flight was proper. *State v. King*, 78 Mo. 555. (6) The sixth instruction properly declares the law as to defendant's testimony. *State v. Cook*, 84 Mo. 40, and cases cited; *State v. Vansant*, 81 Mo. 60; *State v. Cooper*, 71 Mo. 436. (7) The instruction as to an accessory is correct. *State v. Hollenscheit*, 61 Mo. 302, and authorities cited; *State v. Testerman*, 68 Mo. 413; *State v. Phillips & Ross*, 24 Mo. 475; *State v. Miller*, 67 Mo. 607; *State v. Cox*, 65 Mo. 29; *State v. Miller*, 100 Mo. 606; R. S. 1889, sec. 3944. (8) The eighth instruction given on

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the part of the state has been approved in a number of cases, and the court did not err in giving it, or refusing instruction, numbered 6, prayed for by appellant. *State v. Hill*, 65 Mo. 84. (9) The court did not err in refusing to give instruction, numbered 4, as asked by defendants, in relation to the snatching of property from the hand of another. 2 Bishop, Crim. Law, sec. 1167, *et seq.*; *State v. Broderick*, 59 Mo. 318.

THOMAS, J.—The defendants were tried for and convicted of robbery of the first degree in the circuit court of Livingston county in September, 1890, and sentenced to imprisonment in the penitentiary for a term of five years. They have appealed to this court to obtain a reversal of this sentence.

I. It is urged, first, that the indictment is defective, in not charging that defendants *feloniously* put the prosecuting witness "in fear of some immediate injury to his person." This contention is not tenable. The indictment charges that the defendants feloniously assaulted the prosecuting witness and feloniously robbed, stole and took from him the sum of \$7.25. This is sufficient. It is not necessary, at least in Missouri, to allege that the putting in fear was done feloniously. *State v. Wilcoxon*, 38 Mo. 370; *State v. Davidson*, 38 Mo. 374; 2 Bish. Crim. Proc., sec. 1003; Kelly, Crim. Law, sec. 575; R. S. 1889, sec. 3530.

II. The second contention is, that the court erred in failing to instruct the jury that, before they could convict defendants of robbery, they must first find from the evidence that they took the money with a felonious intent. Upon an examination of the instructions given, we find that the court did fail to do this. It is true, one of the instructions given told the jury that, if defendants took any money from the prosecuting witness, "in the manner alleged in the indictment," they were guilty of robbery, and the attorney for the state insists that that is sufficient. We do not think so.

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The court should not refer the jury to the indictment to determine what it is necessary to find in order to convict. The instructions should distinctly inform the jury of all the facts necessary to be found to constitute the offense, and technical terms used should be defined. It is not necessary that the court should use the word "feloniously" in the instructions. If it be used, however, it ought to be defined. When we say that a man "feloniously robs," we simply mean that he takes and removes the money or property of another, *animo furandi*.

Robbery is compounded of larceny and force. The defendants were not guilty of robbery, unless they took the money from the prosecuting witness, without an honest claim to it or any of it, and with the intent to deprive him of the ownership therein.

The instruction given by the court, defining the offense, is as follows: "The jury are instructed that, if they believe from the evidence, beyond a reasonable doubt, that the defendants, James Brown and William Hymes, at the time and place alleged in the indictment, took any money from the person of the prosecuting witness, Herman Ottoman, in his presence and against his will, by then and there putting the said Herman Ottoman in fear of some immediate injury to his person, and that the said money so taken was then and there the property of the said Herman Ottoman, then, if the jury so believe, they will find the defendants guilty and assess punishment at a term of imprisonment in the penitentiary not less than five years."

This contains all of the elements of robbery of the first degree under our statute, except that of the felonious intent. This is omitted, and this is a material error, for which the judgment of the trial court will have to be reversed.

The evidence on the part of the state shows that Herman Ottoman, the prosecuting witness, fell into the company of defendants on the twenty-sixth day of

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July, 1890, at the bridge near Kansas City, and all three went to Chillicothe in a freight train. They staid all night in an old house in the outskirts of the city. Next day, July 27, defendants drew knives and clubs and compelled Ottoman, by putting him in fear of personal injury, to deliver to them \$7.25, all the money he had. The defendants were seen running through a field a short time after the alleged robbery. Ottoman reported what had occurred, and in a short time an officer went in pursuit, found defendants about a mile away, and arrested them. They denied at first having any money, but the officer found \$6.25 on one, and \$1 on the other. Defendants testified that William Hymes, one of them, had loaned Ottoman, a short time before, \$1, and that he promised to pay them \$1.50 more if they would get him and his luggage to Chillicothe. They reached Chillicothe about midnight of the twenty-sixth day of July, and when they arrived there they demanded the money of him, but he said it was too much, but said he would give them \$2, which they agreed to accept. Next morning, when asked for the money, he said he did not intend to give them any. Ottoman then went off and got something to eat. They did not see him any more till about ten o'clock. They went around through the outskirts of Chillicothe, up north of the city and near Sturgis, when they met Ottoman again. They repeated the demand for the \$2. He offered them ten cents, but they told him that would not do.

Hymes says: "He took out a piece of paper, unrolled it and took a \$5 bill and held it in his right hand, and held \$2.25 in his left hand. Brown reached over and took hold of the bill and pulled it, and Ottoman let go it. We then told him to go with us up to Sturgis and get his \$3 out of it. He started south, and as he passed by Brown he gave him the silver. We both told him to come back and get the \$5 bill. We called twice for him to come back. He said, 'I go my way, you go yours.' This was all that was said or

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done. We did not threaten him. We did not draw any knives, We had no club. We did not threaten to kill him. He hallooed. We did not threaten to kill him if he should halloo. We used no force."

On cross-examination, he says Brown jerked the \$5 bill out of Ottoman's hands. Brown corroborates Hymes in all the essential particulars. Some of the witnesses for the state testified that defendants claimed that Ottoman owed them, and that they used no force in getting possession of the money. John Hill, who was called on behalf of the state, testified that the defendants "said on the way to town that they told Ottoman to go with them to Sturgis and get change out of the \$5, as Ottoman owed them \$2."

If this story of the defendants is true, they were guilty of no offense, because the felonious intent was wanting. *Regina v. Hemmings*, 4 F. & F. 50; *State v. Broderick*, 59 Mo. 320; 2 Bish. Crim. Law [7 Ed.] sec. 1162, and cases cited; Kelley, Crim. Prac., sec. 582. That their version of the affair is not as probable as that of the prosecuting witness is immaterial. They had a right to have the question of their guilt or innocence fairly submitted to and passed upon by the jury on the facts they detailed. *State v. Banks*, 73 Mo. 592; *State v. Palmer*, 88 Mo. 568; *State v. Partlow*, 90 Mo. 608; *State v. Young*, 99 Mo. 666.

III. In this case the court should instruct the jury that "if they find from the evidence that defendants, at the county of Livingston and state of Missouri, in July, 1890, took any money, the property of Herman Ottoman, from his person or in his presence and against his will, by putting him in fear of some immediate injury to his person, without any honest claim to such money on their part, and with the intent to deprive the said Ottoman of his ownership therein, then they should find them guilty of robbery of the first degree and assess their punishment at imprisonment in the penitentiary for a term of not less than five years, each. But on the

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other hand, if the jury find from the evidence that the defendants in good faith claimed that said Ottoman was indebted to them in any sum whatever and they took the money from him even against his will, for the sole purpose of obtaining payment of the amount due them, and that they offered to return to said Ottoman all the money they thus obtained, except the amount they claimed to be due them, then they are not guilty of robbery and the jury should acquit them. If, however, they committed the crime of robbery as defined in this instruction, then their offer afterwards to return the money, or a part of it, cannot avail them as a defense."

IV. The court committed no error in instructing the jury that Hymes was guilty of the crime of robbery, if he was present, aiding and abetting Brown in its commission, though he got none of the money (R. S. 1889, sec. 3944, and cases cited in note *d*); nor in telling the jury that, if the defendants were guilty of robbery, the amount of money taken was immaterial.

V. The defendants contend that the court erred in instructing the jury that, "in determining the weight and credibility to be attached to the testimony of defendants, they should consider the fact that they are the defendants." The specific objection to the instruction is in the use of the word "should," instead of "may." This form of instruction has received the sanction of this court in *State v. Cook*, 84 Mo. 40, and in *State v. Young*, 99 Mo. 666, though the court was not unanimous in either case. Section 4218, Revised Statutes, 1889, provides that the fact that the defendant is the party on trial *may* be shown for the purpose of affecting his credibility. When it is shown, however, it is the duty of the jury to consider it. That is what it is introduced for. They are the sole judges, it is true, of the weight to be given it; but they have no more right to leave it out of consideration entirely than any other fact admitted in evidence.

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VI. Another instruction given by the court is criticised because it told the jury that the law presumed what defendants said against themselves was true, but they might believe or disbelieve what they said for themselves. The principle of this instruction has received the sanction of this court in *State v. Hill*, 65 Mo. 84, and in *State v. Brooks*, 99 Mo. 137.

VII. The court committed no error in failing to instruct the jury that defendants might, under the evidence, be convicted of petit larceny. If defendants told the truth, they were guilty of no offense, and, if the prosecuting witness is to be believed, they were guilty of robbery as charged.

For the error pointed out the judgment is reversed, and the cause remanded for new trial in conformity to this opinion. All of this division concur.

RANSOM, *Appellant*, v. THE CITIZENS' RAILWAY
COMPANY *et al.*

DIVISION ONE.

1. **Street Railway: ABUTTING OWNERS: COMPENSATION.** A street railway properly constructed and lawfully authorized does not impose such a new burden as to entitle an adjacent owner of property to compensation therefor.
2. ——— : **CONSTRUCTION OF FRANCHISES.** Grants of rights in streets are not to be extended by construction beyond the reasonable meaning of the language in which they are expressed.
3. ——— : ——— : **DOUBLE TRACK.** A municipal ordinance construed to authorize the substitution by the street railway company of a double track for a single track.
4. ——— : ——— : ———. If a street railway company has the authority to build a line of single or double track, the construction of a single track does not exhaust the power or preclude a later change to a double track when the business demands it.

Appeal from Buchanan Circuit Court.

AFFIRMED.

104	375
140	637
104	875
163	279

Ransom v. The Citizens' Ry. Co.

THIS is a suit to enjoin defendants from laying a track for a street railway, along a certain street in the city of St. Joseph. Upon demurrer the circuit court held that the petition did not state a cause of action for equitable relief. Plaintiff appealed.

The sections of the ordinance, construed in the opinion of the court, are as follows: "Sec. 1. That the right of way of the city of St. Joseph is hereby granted to the Citizens' Railway Company for the construction and operation of street railways in the city of St. Joseph, with the power and privileges to said company to construct double tracks, with turn-outs at switches at convenient points in the city of St. Joseph."

"Sec. 3. The said company shall commence the construction of the line of railway from a point on Third street, near the Pacific House, thence by the most desirable route to the Hannibal & St. Joseph railroad depot, within twelve months from the passage of this ordinance, and the same shall be completed within two years from the date of said commencement, or the privileges herein granted shall be forfeited.

"Sec. 4. The said railway company shall construct its track of iron rails, as near as may be to the center of the streets on which said track may be laid, and the track shall be laid on a grade even with the grade of the streets through which it may pass, so that the free flow of water in lateral and cross-gutters is not thereby obstructed; and the space between the rails and for two feet outside the rails shall be kept in good repair by said company, so as not to obstruct the passing, crossing or traveling on said streets by other vehicles.

"Sec. 5. The tracks of said company and appurtenances shall be maintained in good order and repair, and operated at all reasonable times for the use of the public; and each passenger may be required to pay a fare, not exceeding ten cents, for transportation from any one point on the line to any other point."

The other necessary facts are stated in the opinion.

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Vinton Pike for appellant.

(1) The company's obligation to conform to the requirements of the ordinance was strict. *Elliott on Roads and Streets*, 572, 584. (2) It must be assumed that what was done was intended and understood by the public and company to the compliance with the ordinance. *Lehigh, etc., v. Harlan*, 3 Casey (Pa.) 430. (3) The company can take nothing by implication. It must show an express grant, or that what is claimed is necessarily an incident of such grant. *Packer v. Railroad*, 7 Harris (Pa.) 217, *et seq.*; *Com. v. Railroad*, 3 Casey (Pa.) 339. (4) Intendment against the grantor, which is not to be resorted to in private grants till all other rules fail (*Biddle v. Vandeventer*, 26 Mo. 500-3), cannot be made when the public is the grantor. If the claim is doubtful it is denied, and all doubts must be resolved against the claim. *Com. v. Railroad*, 3 Casey, 339. (5) The plaintiff constructed his building upon his lot on Sixth street while but one track was in the street, and when it was supposed the company had the privilege for but one track. The putting down of double tracks deprives him of ingress or egress to and from his premises, and practically destroys the street as a thoroughfare, so far as plaintiff's right to the use of said street is concerned. *Dubach v. Railroad*, 89 Mo. 483. (6) The city never had the power to permit the street to be devoted to uses that would subvert the purposes for which it was originally dedicated, or appropriated. The abutting owner cannot be deprived of his right to use the street in going to and from his property, and such deprivation is a trespass to private property which cannot be justified under the franchise in question, even if it permitted double tracks to be laid. (7) The petition shows that the use to which defendants were putting the street was an exclusive appropriation of it for street-car purposes. Is it not subversive of the appropriate use of a street for one to

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put the street to such use permanently as will exclude for long intervals all others from any use of it whatever? It is appropriating the street to private use. *Glaessner v. Brewing Co.*, 100 Mo. 508. (8) In any event the defendants in the use they are making of the franchise construed, as they claim, are specially damaging the plaintiff, and he has his action. *Lackland v. Railroad*, 31 Mo. 180.

Amick & Brown for respondents.

(1) The ordinance is the grant of a power with a privilege, the power to construct a line of railway with the privilege of making it a double or single track. (2) "Switches at turn-outs" are used in the operation of both double and single tracks, and could not have been constructed unless authorized by the ordinance. *Elliott on Roads and Streets*, 572; *City v. Railroad*, 18 Atl. Rep. (N. H.) 87. This plaintiff cannot raise the question that the right to build the double track was forfeited by a failure to build the double track within the two years mentioned in section 3 of the ordinance. The city alone can complain of this. *Hovelman v. Railroad*, 79 Mo. 641; *Knight v. Railroad*, 70 Mo. 231; *Railroad v. City*, 66 Mo. 251. The laying of the double tracks is authorized by law and is a legal structure and not a nuisance. Plaintiff avers that it is a nuisance. That is plaintiff's conclusion. The facts, plaintiff pleads, show that this conclusion is not a correct or legal inference. (3) If the laying of the double tracks was a public nuisance, could the plaintiff be heard in a court of equity to complain? A court of equity, as a general rule, will not, at the suit of a private individual, enjoin the laying of a railway in a street. If such act amounts to a nuisance it should be restrained by the public. *Hovelman v. Railroad*, 79 Mo. 641; *Hobart v. Railroad*, 27 Wis. 194. (4) Plaintiff's petition shows that the driveway

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on Sixth street from curb to curb is thirty-six feet; that defendants, by constructing a double track in the street, would occupy thirteen feet in the center of the street, leaving eleven and one-half feet between the curb on each side and the track. Plaintiff does not show that he is deprived of the use of the street to any greater extent than the general public. He has suffered no special injury, hence this action will not lie. *Stetson v. Railroad*, 75 Ill. 74; *Patterson v. Railroad*, 75 Ill. 588; *Railroad v. Schertz*, 84 Ill. 135; *Dubach v. Railroad*, 89 Mo. 483.

BARCLAY, J.—The facts of this controversy are undisputed. The only issue is one of law.

Plaintiff is a property-owner, whose land abuts on the street where the railway track, objected to, is about to be placed. The right to lay the track depends on the proper construction of a municipal ordinance of the city of St. Joseph, the material parts of which are recited in the statement accompanying this opinion.

The ordinance was passed in 1865. The company proceeded at once to construct its line accordingly. It ran from a point on Third street, near the Pacific House, along Francis, Sixth, Messanie and Eighth streets, to the Hannibal & St. Joseph railroad depot. It consisted of a line of single track (with switches or turn-outs, at convenient intervals, for cars to pass each other), and was operated as a street railway by defendant for many years, and until shortly before the beginning of this suit, when the company began to indicate its purpose to substitute a double track for the single track. It is this that plaintiff resists. He claims that there is no authority to lay or operate a double track. This presents the only question in the case.

Such a street railway as this, so laid and operated as not to materially impair access to, or the enjoyment of, the adjacent property may lawfully be placed in the

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public highways of a city, if expressly sanctioned by the proper authority. Such a use does not impose any additional burden entitling the owner of adjoining land to compensation, nor can it be justly regarded, at the present day, as any substantial impairment of the public easement or of the private rights of proprietors of land abutting on the street.

But grants of such rights and privileges in the public streets must not be extended by construction beyond the fair and reasonable meaning of the language in which they are expressed. In the present case the first section of the ordinance confers the right and privilege to construct double tracks, but it is claimed that this refers only to such tracks as are used for turn-outs or switches.

Viewing the ordinance as a whole, we consider its fair and reasonable reading to be that a single track with turn-outs was authorized; but the privilege of laying a double track, if or when needed, was likewise intended to be given. A single track was, no doubt, in immediate contemplation when the ordinance was passed, for, with a double track in use, there would have been no need for turn-outs or switches. The language of section 1 of the ordinance is not as satisfactory or clear, on the point in dispute, as might be desired, but, after the best consideration we have been able to give it, we think its true import will appear by treating the words, "with the power and privileges to said company, to construct double tracks," as if in parenthesis. That would clearly indicate the sense in which the ordinance was intended to be taken, and its reasonable interpretation, and give full effect (according to an established rule of construction) to all its language, discarding none of it as meaningless.

The question then arises whether by constructing and maintaining for many years a single-track railway line, the power conferred by the ordinance was exhausted.

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If we are right in what has been already said, there can be little doubt on this point.

If the authority given embraced the establishment of a line of single track (with turn-outs), as well as the privilege of transforming the single into a double track, it would necessarily follow that the completion and operation of a railway with a single track would be such a compliance with section 2 as was required to vest all the privileges granted. When once the track was laid and the road in operation within the appointed period of time, all the franchises or privileges conferred by the ordinance attached, to be exercised when the exigencies of the business appeared to demand such exercise. The right to construct a double track was appurtenant to the franchise or right to operate a single-track road. As both were sanctioned by the municipal authority, it follows that the establishment of the line in either form would not impair the right of the company to afterwards change to the other form if occasion required, there being no limitation in that regard in the ordinance itself.

The circuit court dismissed the plaintiff's petition and, in our view, correctly. With the assent of all the judges of this division the judgment is affirmed.

 HANLON V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

DIVISION TWO.

1. **Negligence: RAILROAD: RINGING BELL: ORDINANCE.** The failure to ring a bell on a moving railroad engine as required by a city ordinance constitutes negligence.
2. ——— : ——— : ——— : ———. Such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury sued for, but not otherwise.

104	381
108	530
104	381
115	101
104	381
120	648
104	381
124	124
104	381
127	19
128	607
104	381
139	296
71a	171
104	381
147	155

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3. ——— : RINGING BELL : QUESTION FOR JURY. Whether or not the bell was being rung at the time of the accident is, where the evidence is conflicting, a question for the jury.
4. ——— : PREVENTION OF INJURY : QUESTION FOR JURY. Whether the injury might have been prevented had the bell been rung was also a question for the jury.
5. ——— : HIGHWAY : RAILROAD AND TRAVELER. A traveler and a railroad company when using a public highway in common must each look out for the presence of the other ; one to avoid being injured and the other to avoid inflicting injury.
6. **Railroad : TRAVELER : RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.** While such traveler riding on a wagon on the track is guilty of negligence in not looking back for a colliding train, still his negligence will not prevent recovery on his part if the servants of the company in charge of the train saw, or, by the use of proper care, might have seen, the peril to which the traveler was exposed, and thereafter could have avoided the injury and failed to do so.
7. **Negligence : PLEADING : EVIDENCE.** The charge in the petition of negligent management of the train will authorize proof of negligence of the company after its employes saw the peril to which plaintiff was exposed.
8. ——— : INJURY CAUSING DISEASE : QUESTION FOR JURY. Where, in an action for personal injuries caused by the negligence of a railroad, the physician who examined plaintiff after the accident testified that he found evidence of compression of the chest and pneumonia arising from the compression which involved both lungs, and where it appears that the malady from which plaintiff suffered both before and at the trial was superinduced by the pneumonia arising from the injuries, such evidence was sufficient to authorize the finding of the jury that plaintiff's malady was caused by the injuries received in the accident.
9. ——— : PERSONAL INJURIES : DAMAGES : VERDICT. Where the evidence in such action tended to show that plaintiff was confined to his house three weeks after the accident, that both of his sides were compressed, that pneumonia resulted, that up to the time of the trial he was unable to work and suffered continual pain, and, also, that the injury might be permanent, a verdict of \$5,000 will not be set aside by the supreme court as excessive.
10. ——— : ——— : ——— : ———. The question of the amount of the verdict is peculiarly one for the jury and the supreme court will not interfere with it on the ground of excessiveness, unless it clearly appears that such verdict was the result of improper motives or conduct on the part of the jury

104	381
81a	367

104	381
157	641

104	381
160	57

104	381
161	253

104	381
163	654

104	381
172	688

95a	741
98a	144

99a	185
99a	185

99a	185
99a	185

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Appeal from St. Louis City Circuit Court.—HON.
DANIEL DILLON, Judge.

AFFIRMED.

B. Pike for appellant.

(1) Plaintiff's demurrer to the whole evidence should have been sustained. *Matti v. Railroad*, 32 Am. & Eng. R. R. Cases, 73; *Railroad v. Davis*, 32 Am. & Eng. R. R. Cases, 65; *Henze v. Railroad*, 71 Mo. 638; *Gurley v. Railroad*, 93 Mo. 450; *Rafferty v. Railroad*, 91 Mo. 37; *Harty v. Railroad*, 95 Mo. 368; *Field v. Railroad*, 76 Mo. 616; *Braxton v. Railroad*, 77 Mo. 458; *Collins v. Railroad*, 65 Mo. 230-32; *Waldheir v. Railroad*, 71 Mo. 514; Cooley on Torts, 679; Shear. & Red. on Neg., sec. 488. (2) The court committed error in refusing the instructions asked by the defendant, hypothetically submitting the contributory negligence of plaintiff and the driver of the wagon specifically to the jury. *Devitt v. Railroad*, 50 Mo., pp. 304-5; *Zimmerman v. Railroad*, 71 Mo. 490-1; *Yarnall v. Railroad*, 75 Mo. 583. (3) The court erred in giving the instructions asked by plaintiff. (See cases cited under second point.) (4) The verdict was grossly excessive and manifestly the result of prejudice and passion on the part of the jury. *Sawyer v. Railroad*, 37 Mo. 240, and cases therein cited.

D. P. Dyer for respondent.

(1) The position taken by the appellant, that the jury were legally bound to find that the bell on the engine of the appellant was being constantly rung, is without merit. *Murray v. Railroad*, 101 Mo. 236, 242. (2) But, if the position were correct, the appellant would be debarred from raising it by reason of the fact that his own instructions are predicated upon the contrary hypothesis. *Keen v. Schnedler*, 92 Mo. 516;

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Bank v. Armstrong, 92 Mo. 265; *Reilly v. Railroad*, 94 Mo. 600, 611, and cases cited. (3) The facts of the case do not conclusively establish contributory negligence on the part of either the driver or of the plaintiff; they do not even establish *prima facie* proof of such negligence. But, if the driver had been negligent, the plaintiff would not have been affected thereby. *Beck v. Railroad*, 13 S. W. Rep. 1053, and cases cited; *Land Co. v. Mingea*, 89 Ala. 521, and cases cited; *Mills v. Armstrong*, L. R. 13 App. Cas. 1; *Borough v. Brisbane*, 113 Pa. St. 552, 553. (4) It was not necessary for the plaintiff to plead that defendant's engineer saw or by the exercise of reasonable care could have discovered the plaintiff's peril in time to have averted the injury. That matter could be shown to obviate contributory negligence on the part of the plaintiff without being pleaded, and the evidence was used only for that purpose. *Kellny v. Railroad*, 101 Mo. 75; *Hilz v. Railroad*, 101 Mo. 56. And, if it had been necessary to plead it, the defendant is not in a position to avail itself of any failure of the plaintiff to plead it. *Hilz v. Railroad*, 101 Mo. 41. And, finally, in case it had been necessary to plead such default on the part of the engineer, the allegations of the plaintiff's petition are sufficiently broad to have rendered the claim available. *Sullivan v. Railroad*, 97 Mo. 113. (5) The damages assessed by the jury are not excessive. *Griffith v. Railroad*, 98 Mo. 176; *Whalen v. Railroad*, 60 Mo. 323; *Drain v. Railroad*, 86 Mo. 574; *Ridenhour v. Railroad*, 13 S. W. Rep. 889.

MACFARLANE, J.—This is a suit for personal injuries sustained by plaintiff under the following circumstances:

Plaintiff was in the employ of John O'Brien, who was a manufacturer of boilers and sheet-iron goods in St. Louis. On December 13, 1887, plaintiff, with Murphy and Dickson, two other employes of O'Brien, were

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sent with a smokestack about twenty feet long and three feet in diameter, from the factory on the corner of Main and Biddle streets to the depot of the Iron Mountain railroad.

The smokestack was loaded upon a wagon drawn by one mule; Murphy drove, Dickson rode on the front end of the wagon with the driver and plaintiff on the back end of the smokestack. Along the levee running north and south are located the tracks of the Iron Mountain railway, four in number. Poplar street runs east and west and intersects the levee. The next parallel street south of Poplar is Plum, the second, Cedar, and the third, Gratiot. The distance from Poplar to Gratiot street is about one thousand feet. Spruce street runs also east and west, and intersects the levee north of Poplar street. Poplar street extends west to the Union Depot and upon this street defendant company has a track connecting its road with that of the Iron Mountain and the elevators on the levee. The Iron Mountain depot or platform is east of the tracks on the levee. The mule and wagon were driven down Spruce street to the levee and had proceeded to within about twenty feet of the north line of Gratiot street, when an engine on one of the railroad tracks was observed meeting them from the south. The wagon was stopped, and the engine also stopped a short distance in front of the wagon.

At Gratiot street it was the intention of those in charge of the wagon to cross the tracks of the railroad, that being the most direct route to the point to which they were going. The wagon was kept standing either on or very near the west track, a few minutes, to see if the engine in front of it would get out of the way. The engine remaining stationary, the driver of the wagon concluded to change his route and turn up Gratiot street. The distance between the curbing on the corner of Gratiot street and the first rail of the railroad track to the east was five feet. The wagon had been standing on this space, with possibly one wheel over

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the rail. Owing to the projection of the smokestack to the rear of the wagon, the driver thought it necessary, in order to make the turn into Gratiot street, to pull first a little to the left, which brought the wagon over the first rail of the track.

Plaintiff, sitting on or in the rear end of the smokestack, had been giving his attention to the engine in front of him, as also had the two men in the front end of the wagon. While standing, none of them had looked back north to ascertain whether engines or trains were approaching from that direction. About the time the wagon passed over the rail, some one in front of the wagon called to plaintiff and the other two men on it to jump or they would be killed. On looking back an engine drawing a train of twenty freight cars was discovered coming south on the first track, nearly upon the wagon. Plaintiff jumped about the time the train collided with the wagon, from which he received the injuries for which he sues. Plaintiff and his companions all testify that the bell on the engine that struck the wagon was not ringing. The evidence tended to prove that, when the freight train turned from Poplar street onto the levee, the wagon was noticed by the engineer in charge, standing close by or upon the track; that the train was running at the rate of three miles per hour and could have been stopped within the space of two hundred feet. The engineer and fireman both testified that the bell on the engine was ringing continuously, from the time it started on Poplar street, until the collision.

The petition charged negligence in the manner in which the engine and cars were managed and moved. It also charged negligence in its failure to have a watchman stationed at the intersection of Gratiot street and the levee; in its failure to display proper signals at the intersection of said streets; in running said train at a greater rate of speed than six miles per hour; and in its failure to ring the bell on its engine continuously,

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all alleged to be in violation of the requirements of certain ordinances of the city. Defendant's answer was a general denial and a plea of contributory negligence. The reply denied contributory negligence.

I. At the close of all the evidence defendant asked the court to instruct the jury that the evidence was not sufficient, under the pleadings, to authorize a verdict for plaintiff. This the court refused, and defendant now insists that it committed error in not doing so.

There was no evidence that the train which collided with the wagon was running at a rate of speed in excess of six miles per hour, nor that the collision occurred by reason of a failure to keep a watchman at the intersection of Gratiot street with the levee, and, therefore, the charges of negligence in regard to the speed of the train and the duty to keep a watchman and give signals at street intersections were not sustained, and are eliminated from the case. No instruction was asked, or given, on the hypothesis of negligence in these particulars, and we may assume that these charges were abandoned.

We are then only to determine whether there was evidence tending to prove the remaining charges, and if so whether there was such concurring negligence on the part of plaintiff as would defeat his recovery notwithstanding the negligence of defendant.

The ordinance required the bell, on a moving engine, to be rung continuously, and it is well settled that a failure to observe such reasonable and wholesome requirements constitutes negligence in itself. *Karle v. Railroad*, 55 Mo. 477; *Murray v. Railroad*, 101 Mo. 236. Such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury, but not otherwise. *Karle v. Railroad*, 55 Mo. 482; *Zimmerman v. Railroad*, 71 Mo. 476; *Barkley v. Railroad*, 96 Mo. 367; *Hudson v. Railroad*, 101 Mo. 18; *Henry v. Railroad*, 76 Mo. 293.

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Two or three witnesses who were in a situation to hear, and who were in a position that should have caused them to listen, testified either that no bell was rung, or that they heard none ring. On the other hand two or three witnesses, who should have known, testified positively that the bell was kept ringing continually. While the testimony of these witnesses, testifying positively to the fact of which their situation at the time gave them positive knowledge, entitles their testimony to greater weight, in the absence of discrediting circumstances, than those testifying negatively to the same fact, still the circumstances surrounding the collision, the situation of the witnesses, the remoteness in time of the occurrence, and the credibility of the witnesses, were all to be taken into account to determine the fact whether or not the bell was rung. Under such conflict in the evidence, the court could not pronounce upon its conclusiveness, or weight even, as a matter of law. We must, therefore, conclude that there was evidence that the bell was not rung as required by the ordinance. *Murray v. Railroad*, 101 Mo. 236.

Neither can it be said as a matter of law, that the injury might not have been prevented had the signals been given.

It is insisted that, although the signals were not given, and if they had been given the injury might have been averted, still the negligence of plaintiff himself, in not observing the common prudence of looking out for his own safety, concurred with that of defendant, and the injury resulted on account of the concurring negligence of both, and for that reason debarred plaintiff from recovery. It is well settled by authority, as well as enjoined by the common dictates of prudence, that one, going upon the track of a railroad, should observe all such precautions for his own safety, as reason and prudence dictate, and, if disaster comes upon him by reason of a failure to do so, he must bear the consequences. *Yancey v. Railroad*, 93 Mo. 436; *Harlan v. Railroad*,

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64 Mo. 480; *Lenix v. Railroad*, 76 Mo. 86; *Moody v. Railroad*, 68 Mo. 470.

This rule has, however, a qualification which is founded upon principles of humanity and is universally recognized. This qualification enjoins upon the railroad company the duty of using all reasonable efforts to avoid injury to one who has negligently placed himself in a position of danger, if the peril is known, or, under certain circumstances, by reasonable care might have been known. A failure to observe this requirement renders the company liable notwithstanding the previous negligence of the person injured. *Rine v. Railroad*, 88 Mo. 396; *Maher v. Railroad*, 64 Mo. 267; *Bergman v. Railroad*, 88 Mo. 678; *Kellny v. Railroad*, 101 Mo. 67.

The rule, and the qualification of it, require precautions to be observed by both the railroad company and the traveler, when using a public highway in common. The precautions to be used by each must necessarily vary, with varying circumstances, and no positive rule can be laid down which can be made a test in every case. One rule for their mutual government is imperative, which is the duty and obligation for each to watch for the presence of the other, one to avoid being injured, the other to avoid causing injury. The railroad company must give some regard to the known imprudence of mankind and not content itself with the mere obedience to the law requiring signals to be given, and the traveler must, in like manner, take precautions for his own safety, and not depend entirely upon the railroad company to protect him, or give him timely notice of danger. *Kimes v. Railroad*, 85 Mo. 611; *Stoneman v. Railroad*, 58 Mo. 503; *Wilkins v. Railroad*, 101 Mo. 93.

Plaintiff was in a situation upon the wagon, from which he could, by the single effort of turning his head, and using his eyes, have seen the approaching train, from the time it came into the street in which the

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wagon was standing, a distance of a thousand feet. He saw railroad tracks upon, or by the side of, which the wagon was standing. These themselves were a "notice and warning of danger." *Matta v. Railroad*, 69 Mich. 109.

At the rate the train was moving it would have taken it three or four minutes to move from Poplar street to the point of collision, during all which time it was in plain view. It does not appear that plaintiff turned his head in that direction at all during that time. There can be no doubt, we think, that plaintiff was negligent under the circumstances in failing to see the approach of the train. The court should have directed a verdict for defendant unless the facts bring the case within the qualification above mentioned. Did they do so?

The evidence shows that the levee, upon which the injury occurred, was a public street upon which both plaintiff and defendant's trains had mutual rights.

It is the duty of anyone using dangerous instrumentalities to observe watchfulness to avoid injuring persons where they have a right to be, and where they may reasonably be expected. The degree of watchfulness to which they should be held is proportionate to the injuries they may possibly produce. The degree of vigilance required of those in charge of an engine and train, in places used in common with them by the public, should be of the highest character. This wagon could have been seen by the engineer in charge of the train, for near a thousand feet up the track which was entirely open and free of obstruction. In fact, the engineer testified that he did see it from the time he first turned onto the levee from Poplar street. He saw the wagon standing still either upon or so near the track that unless moved a collision was inevitable, which must have been an unusual occurrence. He must have seen the long smokestack extending to the rear. He must have seen plaintiff and the other occupants of

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the wagon giving no heed to his approach. He testified himself that the train was only running three miles per hour, and that it could have been stopped in a distance of two hundred feet. If those in charge of the train saw, or by the use of proper care might have seen, the peril to which plaintiff was exposing himself, and thereafter could have avoided the injury and failed to do so, the facts would bring the case under the qualifications of the rule, and plaintiff could recover, notwithstanding his contributory negligence. The court then properly overruled the demurrer to the whole evidence.

II. Defendant asked two instructions directing the jury to find for defendant in case they found that plaintiff was negligent in failing to look out for the train. These instructions the court properly refused for the reason that they wholly ignored the qualification of the rule hereinbefore discussed. They directed a verdict for defendant if the negligence of plaintiff concurred in producing the damage regardless of the subsequent negligence of defendant, which was more than defendant had a right to ask. Defendant asked no other instructions on contributory negligence, and cannot complain that none were given.

The pleadings, we think, authorized the evidence introduced for the purpose of proving negligence of defendant after its employes saw the peril to which plaintiff had exposed himself. The charge of negligent management of the train was sufficient for that purpose. *Kelley v. Railroad*, 101 Mo. 75; *Hilz v. Railroad*, 101 Mo. 56.

III. Defendant insists that there was no sufficient evidence before the jury to justify them in concluding that the disease from which plaintiff claims to have suffered was in consequence of the injuries received by him from the accident. We do not think the contention well founded. The doctor who examined plaintiff after his injuries testified that, on his examination, he found evidence of compression of the chest, and pneumonia

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arising from that compression, which involved both lungs. The disease from which he suffered, and at the trial still suffered, was superinduced by the pneumonia caused by his injuries. At least the evidence of the fact was sufficient to go to the jury.

IV. It is also insisted that the verdict for \$5,000 is excessive and was manifestly the result of prejudice and passion on the part of the jury. It must be admitted that the verdict does appear large, considering the extent of the injuries received as appears from the evidence, but it does not appear so grossly excessive as to indicate prejudice, passion or corruption on the part of the jury. The evidence tends to show that plaintiff was confined to his house three weeks; that both sides were compressed; that pneumonia resulted; that up to the time of the trial he had not been able to work and suffered continual pain. There was also evidence tending to prove that the injury might be permanent. The question of the amount of the verdict was peculiarly for the jury, and this court ought not to interfere unless it clearly appears that the verdict was the result of improper motives or conduct on the part of the jury. *Griffith v. Railroad*, 98 Mo. 176; *Drain v. Railroad*, 86 Mo. 574.

V. No serious objections are made to the two instructions given on behalf of plaintiff, other than that there was no evidence that defendant's engineer saw, or might have seen, plaintiff's danger in time to have avoided injuring him. This question has received our consideration under another point.

The testimony of the engineer himself was sufficient to justify the court in submitting the question to the jury. The instruction authorized a recovery though plaintiff and the driver were negligent in not seeing the approaching train, if their dangerous situation was discovered, or by reasonable diligence might have been discovered, by the engineer, in time to have prevented the accident. This instruction submits the question fairly to the jury.

Judgment affirmed; all concur.

Stanton v. Boschert.

STANTON, *Appellant*, v. BOSCHERT *et al.*

DIVISION ONE.

1. **Attachment of Land: LIEN.** The filing in the recorder's office by the sheriff of an abstract of the attachment, as required by Revised Statutes, 1879, section 420, is necessary to perfect an attachment lien on land.
2. **Fraudulent Conveyance.** The evidence in this case examined and *held* to show that a deed of trust executed by the debtor was made in fraud of creditors.
3. **Attachment: ESTOPPEL.** Where two attachments are levied on the same land and it is sold under both, the fact that the prior attaching creditor obtains an order to have the surplus proceeds arising from the sale under the junior attachment applied to the satisfaction of his debt does not estop him, as against the holder of a fraudulent deed of trust given before any of the attachments, from claiming to be the prior attaching creditor.

Appeal from St. Louis City Circuit Court.—HON.
SHEPARD BARCLAY, Judge.

REVERSED AND REMANDED.

Eber Peacock for appellant.

(1) The levy of the attachment in the case of John Stanton v. Alois Boschert, and the lien created thereby, were prior in point of time to the levies and liens of the attachments in the cases of R. F. Wheeler *et al.* v. Alois Boschert and of I. W. Overstreet *et al.* v. Alois Boschert, and the court should have so found. *First.* The default of Sheriff Mason, a defendant in this case, as well as the answer of defendant, F. F. Henseler, in failing to deny the same, admit such priority. *Second.* The evidence in the case also establishes such fact. *Lackey v. Seibert*, 23 Mo. 83; *Taylor v. Mixter*, 11 Pick. 347; *Drake on Attachment* [6 Ed.]

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104	393
71a	390
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149	583
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187	558
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p. 234. *Third.* The answer of F. F. Henseler is a plea of confession and avoidance, and, unless so construed, estoppel is not pleaded to be available as a defense; it must be specially pleaded, and be pleaded with certainty. Bigelow on Estoppel, p. 712; *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Hammerslough v. Cheatham*, 84 Mo. 13; *Miller v. Anderson*, 19 Mo. App. 71; *Weise v. Moore*, 22 Mo. App. 531. (2) The deed of trust, dated September 19, 1884, recorded in book 740, page 191, purporting to be executed by Alois Boschert and wife to F. F. Henseler's trustee, is void as against plaintiff herein, because: *First.* Said deed was made by Boschert with the intent to fraudulently hinder and delay his creditors, of whom plaintiff was one, and Henseler participated in it with knowledge of such purpose. *Burgert v. Borchert*, 59 Mo. 80; *Rupe v. Alkire*, 77 Mo. 641; *Dougherty v. Cooper*, 77 Mo. 528; *Albert v. Besel*, 88 Mo. 150; R. S. 1879, sec. 2497; R. S. 1889, sec. 5170. *Second.* Because it was made without any consideration passing for it, and plaintiff was a creditor of Boschert at the time of its execution. The record in the attachment case of *Stanton v. Boschert*, number 65827, read in evidence on the trial below, is conclusive as to the defendant Boschert, on the question of fraud and voluntary character of the deed of trust. And the failure of defendant Henseler in his answer to deny such allegations is conclusive as to him. *Payne v. Stanton*, 59 Mo. 158; *Hurley v. Taylor*, 78 Mo. 238; *Lionberger v. Baker*, 83 Mo. 447; *Bank v. Overall*, 16 Mo. App. 510. (3) The purchase by F. F. Henseler at sheriff's sale under execution in the Wheeler and Overstreet cases against Boschert of the Boschert interest in the land inured to the benefit of Boschert and vested no absolute title in Henseler. *First.* Because, at the time of said purchase, Henseler was the debtor of Boschert to the extent of the \$7,200 covered by the deed of trust between them, dated September 19, 1884; which deed, while void as

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to creditors, was good *inter partes*, and the evidence shows that Henseler never paid any money therefor. *Allen v. Berry*, 50 Mo. 90; *Bobb v. Woodward*, 50 Mo. 95; *Walsh v. Ketchum*, 84 Mo. 427; R. S. 1879, sec. 2497. *Second*. Because the evidence shows that the purchase was for the benefit of Boschert, who has ever since enjoyed the property. *State to use v. Jacob*, 2 Mo. App. 183. A resulting trust would, therefore, arise in favor of Boschert, upon which the deed acquired by Stanton would operate and vest the title in Stanton. *Bobb v. Woodward*, 50 Mo. 95; *Herrington v. Herrington*, 27 Mo. 560; *Henderson v. Dickey*, 50 Mo. 161; *Harrison v. Smith*, 83 Mo. 210. (4) Respondent, F. F. Henseler, relies on equitable estoppel as a defense to this action, and the court below erred in dismissing the bill on that ground, because: *First*. Equitable estoppel cannot be invoked to sustain a fraud, and fraud is admitted by Henseler's answer, because not denied. 2 Herman on Estoppel, 1211, side p. 1080; *Mattison v. Ausmuss*, 50 Mo. 551; Bigelow on Estoppel, 712; *Bobb v. Woodward*, 42 Mo. 482. *Second*. Estoppel cannot be sustained in this case, because if there was no priority of attachment lien in Stanton's case, the surplus realized at sheriff's sale under the Wheeler and Overstreet executions was properly applicable to the next subsequent execution. *Strawbridge v. Clark*, 52 Mo. 21. *Third*. If the levy in the Stanton attachment case created a prior lien to the Wheeler and Overstreet liens, estoppel cannot be evoked, because the attachment levy creates no interest in the land, nor in anywise affects the title or possession of the defendant in the attachment, and in the event the attachment is sustained and results in a judgment and sale under execution, all that the purchaser at such sale would acquire would be whatever interest the defendant had at the time the attachment was levied; such a one would be a purchaser *pendente lite*. The interests acquired at the respective sheriff's sales are adverse. Drake on Attachments

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[5 Ed.] 234; *Ensworth v. King*, 50 Mo. 477; *Durrett v. Hulse*, 67 Mo. 201; *Turner v. Babb*, 60 Mo. 342; *Hall v. Morgan*, 79 Mo. 50. The order of the circuit court directing the sheriff to apply the surplus of \$55.49 to the partial satisfaction of the Stanton execution, was a judicial determination that it legally belonged there. R. S. 1879, sec. 447; R. S. 1889, sec. 550. (5) The confederation between Boschert and Henseler in maintaining a fraud being shown, the title acquired at the sheriff's sale by Henseler thus became tainted with the fraud. *Armstrong v. Toler*, 11 Wheaton, 258.

H. B. Davis for respondent Henseler.

(1) The appellant is estopped, by his own act, from claiming that his attachment is a prior lien to the Wheeler and Overstreet attachments. *Strawbridge v. Clark*, 52 Mo. 21. (2) The time of the attachment liens is determined by the return of the sheriff, and can only be controverted in an action against the sheriff for a false return. *Hallowell v. Page*, 24 Mo. 590; *Phillips v. Evans*, 64 Mo. 17. (3) The appellant, by taking the benefit of the surplus, is estopped from setting up that the sale to Henseler was fraudulent. *Stoller v. Coates*, 88 Mo. 514; *Valentine v. Decker*, 43 Mo. 583; *Sutweiler v. Lackman*, 23 Mo. 168.

BLACK, J.—The defendant Boschert, being the owner of a parcel of land in St. Louis, having a front of two hundred feet by a depth of about one hundred and thirty feet, conveyed the same to a trustee by deed, dated the nineteenth of September, 1884, to secure his note of that date for \$7,000, payable in five years to Frank F. Henseler. There was a dwelling-house and a two-story slaughter-house and outhouses on the property, and it was incumbered by two prior deeds of trust amounting to \$4,750.

On the twenty-second of September, 1884, Wheeler and others and Overstreet and others commenced two

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suits by attachment against Boschert, and in the afternoon of that day caused the writs to be levied upon personal property found in and about the slaughter-house. The attorney prosecuting these suits directed the sheriff to levy upon the real estate, saying he would furnish a description of the same the next day. On the following day, the twenty-third, Stanton, the plaintiff in the present suit, commenced another suit by attachment against Boschert, and at the same time furnished the sheriff with a description of the real estate, and the sheriff indorsed a levy on this Stanton writ at ten minutes after eleven o'clock in the forenoon. At that time the sheriff had made no levy of the Wheeler and Overstreet writs upon the real estate, no description having been furnished as promised ; but in about half an hour thereafter he levied those writs by making an indorsement thereon, using the description of the land furnished by Stanton. He dated these levies on the twenty-second instead of the twenty-third, when made, thus making the Stanton levy appear to be subsequent in point of time. The abstract of the Stanton attachment was filed with the recorder of deeds at 1: 25 P. M. of the twenty-third, and the abstract in the other cases was filed three minutes later. This difference in the time of filing the abstracts with the recorder was intentional on the part of the sheriff.

Notwithstanding the defendant interposed pleas in abatement, the attachments were all sustained, and Stanton recovered judgment for \$5,838, Wheeler and others for \$1,558, and Overstreet and others for \$336. The attached real estate, except that set off as a homestead, was sold on March 24, 1885. It was sold under the Stanton execution first and he became the purchaser at \$1,300, and it was then sold under the other two executions to Hoffman for \$1,800, who purchased for, and the deed under that sale was made to, Henseler.

Stanton commenced this suit in equity in November, 1885, against Boschert, the sheriff and Henseler, setting

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up the foregoing facts and alleging that the deed of trust from Boschert, dated the nineteenth of September, 1884, for the benefit of Henseler, and the purchase of the property by Henseler at the sheriff's sale, were fraudulent transactions as against the creditors of Boschert, and asking that those deeds be set aside, and that his attachment be declared the prior lien.

1. There can be no doubt but the Overstreet and Wheeler attachments were sued out in good faith, and we shall first consider the question of priority of the attachments as between the attaching creditors themselves.

Prior to the revision of 1835, it was the duty of the officer in making an attachment to go to the premises and declare, in the presence of one or more persons, that he attached the property, and to state in his return the names of the persons in whose presence the attachment was levied. The Revised Statutes of 1835 omitted these acts of notoriety on the part of the officer, and so the law continued down to 1864, when it was amended in some respects not necessary to be noticed here. Acts of 1863-4, p. 7. By the Revised Statutes of 1865 and 1879, it is provided :

When lands are to be attached, the officer shall describe the same in his return and declare that he attached all the right, title and interest of the defendant; "and shall, also, file in the recorder's office of the county where the real estate is situate an abstract of the attachment, showing the names of the parties to the suit, and the amount of the debt, the date of the levy, and a description of the real estate levied on by the same, which shall be duly recorded in the land records, and the recording paid for by the officer, and charged and collected as other costs;" and the officer shall, moreover, give notice to the actual tenants, if any, at least ten days before the return day of the writ.

That part of the above statute included in quotation marks and relating to the abstract to be filed with

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the recorder became a part of the statute for the first time in 1865. Before this date and after 1835, it had been often ruled that a failure to give the tenant ten days' notice before the return day of the writ would not defeat the attachment, and this for the reason that the giving of notice to the tenant constituted no part of the ceremony required to make a levy of the attachment writ. *Lackey v. Seibert*, 23 Mo. 85; *Durossett's Adm'r v. Hale*, 38 Mo. 346; *Huxley v. Harrold*, 62 Mo. 516. The same cases also hold that the lien of the attachment dated from the moment the levy was indorsed upon the writ, though the writ still remained in the hands of the officer making the levy.

The third requirement of the statute, namely, the giving of the ten days' notice to the tenant before the return day of the writ is the same as in former statutes and should receive the same construction. But the new provision requiring an abstract of the levy to be filed with the recorder is different in its purpose. Writs of attachment are issued by the clerk, returnable to the next term of court, and levies may be made by the officer to whom they are addressed at any time before the return term. Before this amendment it was, therefore, necessary for purchasers and other attaching creditors to inquire of all officers who might have prior attachment writs in their hands. The amendment was designed to remedy this evil. The statute, it is true, does not in terms declare that the lien of the attachment shall date from the time the abstract is filed with the recorder of deeds, as is the case in some of the states (*Davis Sewing Machine Co. v. Whitney*, 61 Mich. 518); but unless that is its effect it must fail in accomplishing the purpose for which the amendment was designed.

The filing of the abstract is an act to be done at the time of indorsing the levy upon the writ, and is an act entering into and constituting a part of a levy of an attachment upon lands, and is a condition precedent to a valid attachment lien. An attachment lien is a

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creature of the statute, and there can be no such lien until there has been a fair compliance with the conditions prescribed for acquiring the same, and the filing of an abstract with the recorder is one of those conditions. There is almost always a race of diligence between attaching creditors, and we can see but one rule to determine the question of priority under the present statute, and that is this, that the lien dates from the time the abstract of the levy is filed with the recorder, and the creditor prior in point of time in this respect has the prior lien. If such priority is procured by fraud then the lien so procured will be postponed, but in this case the Stanton abstract was of right filed first, for his levy was first in point of time. It follows that the Stanton attachment constituted the prior lien, and the sheriff's deed to him conveyed all the title that Boschert had at the date of the attachment. Henseler acquired nothing by virtue of his purchase at the sheriff's sale under the Wheeler and Overstreet executions.

2. With the foregoing conclusion it becomes necessary to consider the issue of fact tendered by the plaintiff that the deed of trust from Boschert to Henseler to secure the note of \$7,000 due in five years was a contrivance to defraud creditors. The evidence in substance is this: At that date Boschert owed debts to a large amount, and his creditors were pressing him, some of them threatening to attach, and all this to the knowledge of Henseler. According to Henseler's evidence taken on the trial of one of the attachment suits, and read in evidence by the plaintiff on the trial of this case, Boschert applied to him for a loan of \$10,000. He agreed to loan Boschert \$5,000 on the real estate, deducting \$800 which Boschert owed him. Five years' interest was added, making the note \$7,000, and he executed to Boschert a check for \$4,200 on account of this alleged loan. Henseler says he at the same time loaned Boschert \$1,000 for one year, and to secure the

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same took a mortgage on personal property in and about the slaughter-house. He says he also purchased from Boschert's wife another parcel of real estate at the price of \$2,000.

These transactions were all made and the deed, deed of trust and mortgage executed at the same time. Henseler says he gave Boschert at that time checks amounting to \$7,200; but his further examination and other evidence disclosed the fact that Boschert gave these checks back to Henseler on the same day, and that Henseler turned them over to the firm of Steinweider & Sellner, who collected them through their bank. That firm, in three or four days thereafter, gave Henseler their checks for a like amount, and he collected them. This manipulation of checks, it will be seen, was a mere sham, and Boschert did not receive a cent on account of them. This state of facts appearing, Henseler then testified that he paid Boschert \$7,200 in cash on the evening of the nineteenth of September, that he had the money in his safe, and that he had kept it there for nine months. He admits that during that time he borrowed money from his bankers. He states that he gave the checks to Boschert to show the transaction on his ledger or cash book, but later on in his evidence it appeared that neither the checks nor the payment of the cash appeared upon his books.

Boschert says he got the money from Henseler, but after the nineteenth of September, and that he got it at different times. He gives no satisfactory account of the payment to him of any money whatever on account of the deed of trust. Says he has had an accounting with Henseler since the date of the deed of trust and that there are \$300 or \$400 due Henseler yet. The mortgaged personal property was sold in the Wheeler and Overstreet attachment proceedings and purchased by Hoffman at the request of Henseler and then turned over to Mrs. Boschert, and Mr. Boschert continued his

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business at the same place, but in the name of his wife. He claims to occupy the property in question as the tenant of Henseler, but there is no evidence that he pays any rents.

Enough of the leading features of the evidence has been given to show that the deed of trust was a mere contrivance to defraud the creditors of Boschert. That it was a fraudulent transaction is not questioned in the brief filed for and in behalf of the defendants. As against the plaintiff the deed of trust cannot, and ought not to, stand, and should be set aside because made in fraud of Boschert's creditors.

3. The defendant Henseler, in his answer in this case, besides a general denial, sets up and made proof of certain facts which he contends estop the plaintiff from disputing the validity of the deed of trust and from now claiming to be the prior attaching creditor. The facts proved are these: The attached real estate was sold, as we have said, on March 24, 1885, first under Stanton's execution and purchased by Stanton, and then under the Wheeler and Overstreet executions and purchased by Hoffman for Henseler, to whom the sheriff executed a deed. This sale of the real estate under the Wheeler and Overstreet executions paid those debts and costs and left a surplus of \$52.94. On the motion of Stanton, the court ordered the sheriff to apply this surplus on the balance due on the Stanton execution, and it was so applied. This order was made in the Stanton attachment case, after the sheriff had executed the deeds to Stanton and to Henseler.

If, as we have held, Stanton was the prior attaching creditor, then the surplus proceeds arising from the sale under the junior attachments would not go to him, but would go to subsequent attaching creditors, if any there had been, but, as there were none, the surplus belonged to Boschert. Now we do not see how the receipt of this money by Stanton can operate as an estoppel in favor of Henseler, for his rights, whatever they were, were

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fixed long before the order was made. He had nothing to do with the surplus, and was in no manner misled by the payment of it to Stanton.

Again, there is nothing in this record to show that Stanton applied for or procured the order on the ground that he was a subsequent attaching creditor.

The sheriff had in his hands an unsatisfied execution in favor of Stanton against Boschert, and he had the small amount of money in his hands belonging to Boschert; and this money the court ordered him to apply on the execution. This order in no way affected Henseler, and he is the only party who contends for an estoppel.

From the views before expressed, it follows that the decree in this case should be reversed and the cause remanded with directions to the circuit court to enter up a decree setting aside the deed of trust from Boschert to Henseler and declaring the plaintiff the prior attaching creditor, and it is so ordered. BARCLAY, J., not sitting; SHERWOOD, C. J., and BRACE, J., concur.

IRWIN, *Appellant*, v. WOODMANSEE *et al.*

DIVISION ONE.

1. **Practice in Supreme Court: FINDING OF FACTS.** The finding of facts by a court in an action at law stand upon the same footing as the verdict of a jury, and will not be disturbed by the supreme court if there is substantial evidence to support it.
2. ——— : **ADVERSE POSSESSION.** The evidence in this case reviewed and *held* to support the finding of the court that defendants' possession of the land in controversy was continuous and adverse.
3. **Practice: CONTINUANCE.** It was not error for the trial court to refuse a continuance because of the absence of a witness, where no diligence was used to procure his evidence at the trial.
4. **Evidence: DEED, RECITALS IN.** Evidence tending to show how land was occupied, and the line to which it was claimed, *held* not incompetent as contradicting the recitals in a deed.

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Appeal from Jasper Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

T. B. Haughawout for appellant.

(1) It being admitted in this case that appellant is the owner of the paper title to the strip of land in question and that he had bought and paid for the same, the burden was on the respondent to prove an adverse and antagonistic possession of said land under color and claim of title by herself, and those under whom she claims, for ten years before the commencement of this action. *Russell v. Davis*, 38 Conn. 562; *Boadley v. West*, 60 Mo. 33. (2) There was no adverse possession shown in this case. The fence remaining where it was when David Woodmansee sold to S. D. Woodmansee in 1875 up to the time plaintiff bought in 1883, and could not be considered an act on the part of David Woodmansee indicating his intentions of holding adversely to S. D. *West v. Railroad*, 59 Mo. 510; *Brown v. Cockrell*, 33 Ala. 45; *Lamb v. Coe*, 15 Minn. 642; *Irvine v. Adler*, 43 Cal. 569. (3) Where a person owns a tract of land, and as in this case sells a part of the same to another by metes and bounds, with the understanding that they should both occupy to a certain line until the true line is ascertained by survey, there can be no adverse holding until after the true line is ascertained. *University v. McCune*, 28 Mo. 48; *Kincaid v. Danney*, 51 Mo. 552; *Tanner v. Kellogg*, 48 Mo. 118. (4) The affidavit of George Cunningham filed in support of the motion for a new trial shows that in the year 1883, at the time appellant bought this tract of land from S. D. Woodmansee, both David Woodmansee and S. D. Woodmansee pointed out to him the true line, nine feet north of the fence between the respective premises, and, therefore, shows conclusively that there never was an

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adverse occupancy of the land in question by David Woodmansee, and appellant's motion for a new trial should be sustained. (5) Nancy Woodmansee, in her testimony in this case, claims that the land in question was deeded to S. D. Woodmansee through mistake. This being the case, the statute of limitation did not commence to run until the mistake was discovered, which she testifies was the spring before the commencement of this suit. *Grundy v. Grundy*, 12 Mon. (Ky.) 269; *Knowlton v. Smith*, 36 Mo. 507; *Thomas v. Babb*, 45 Mo. 384; *Gruhe v. Mills*, 34 Iowa, 148. (6) The evidence of Nancy DeMott, and Grant Woodmansee as to what land David Woodmansee intended to deed to S. D. Woodmansee in 1875, was clearly inadmissible as an attempt to change the recitals in a deed by oral testimony. *Wildbahan v. Robidoux*, 11 Mo. 659; *Jennings v. Brizeadine*, 44 Mo. 330; *Hartt v. Rector*, 13 Mo. 485; *Orn v. How*, 55 Mo. 328; *King v. Fink*, 51 Mo. 209.

E. O. Brown and C. A. Peterson for respondents.

(1) Where adjoining proprietors hold possession up to a given line but without claiming or intending to claim beyond the true line, wherever that may turn out to be, the possession will not be adverse to the true owner. But where, as in this case, one takes and holds exclusive possession up to a wall or fence, and claims to be the owner up to that wall or fence, his possession will be adverse. *Cole v. Parker*, 70 Mo. 372; *Handlan v. McManus*, 100 Mo. 124; *Walbrunn v. Ballen*, 68 Mo. 164; *Hamilton v. West*, 63 Mo. 93; *Atchison v. Pease*, 96 Mo. 566. (2) Where adjoining proprietors fix or agree upon a certain fence as a boundary line, and take possession accordingly, the agreement is binding on them and those claiming under them. Such an agreement is not within the statute of frauds. *Jacobs v. Mosley*, 91 Mo. 462; *Taylor v. Zepp*, 14 Mo. 482; *Blair*

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v. Smith, 18 Mo. 273; *Turner v. Baker*, 64 Mo. 218; *Acton v. Dooley*, 74 Mo. 63; Browne on Frauds, sec. 75; *Krider v. Milner*, 99 Mo. 145. (3) The appellate court in law cases has only the power to review the law declared by the trial court, and when that court is intrusted with both the facts and the law the appellate court must assume the facts to be as the trial court finds them, and the unvarying practice is not to disturb such finding. *Warren v. Maloney*, 39 Mo. App. 295; *Handlan v. McManus*, 100 Mo. 124; *Hamilton v. Bog-gess*, 63 Mo. 233; *Gaines v. Fender*, 82 Mo. 497.

BRACE, J.—This is an action in ejectment to recover a strip of land nine and one-half feet wide by four hundred and twenty-four and one-half long, in the city of Carthage, in Jasper county. The petition is in the usual form. The suit was originally brought against Nancy Woodmansee, tenant of Harriet Fabyan, who was made a party defendant on her own motion. The defense set up in the answer was the statute of limitations. The case was tried before the court without a jury and resulted in a judgment for the defendant, from which plaintiff appeals.

The suit was instituted on the tenth of June, 1887. David Woodmansee is the common source of title. In 1872 he purchased a three-acre lot in the city of Carthage and took possession thereof, fenced it, erected a house, and made other improvements on the north part of said lot, and built a fence running east and west through the lot, fencing off about an acre on the south side for a cattle lot. On the thirtieth of March, 1875, David Woodmansee conveyed to his son Solomon D., by metes and bounds, the south part of the lot. Solomon took possession of his part of the lot and occupied it to the line of this east and west fence until September, 1880, when he conveyed it, by the same description, to the plaintiff, who took possession and occupied it to the same line by tenants or in person until the spring of

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1887, when he had a survey made of his lot and brought this suit.

It was admitted that the strip of land sued for was within the east and west boundary line called for in his deeds, which was about nine and one-half feet north of the line of said fence. The defendant Fabyan by mesne conveyance has acquired the legal title of David Woodmansee to the north part of said lot not conveyed to his son Solomon. The strip of land sued for, lying along and north of said fence, has, ever since the conveyance by David Woodmansee to his son Solomon, remained in the open, notorious, continuous, exclusive and actual possession and occupancy of the said David and his grantees, to the line of said east and west fence, and was so in the possession of the defendant when this suit was brought.

I. The only question in the case was whether such possession by the defendant and her grantors was adverse; this question of fact was fairly presented and passed upon by the court under a series of declarations of law in which no error is pointed out, and in which we have been unable to discover any. If any error was committed, it is in the finding of the courts on the facts. When, in an action at law, the facts as well as the law are intrusted to the determination of the court, its finding upon the facts stands upon the same footing as the verdict of a jury, and will not be disturbed if there is substantial evidence to support such finding. *Handlan v. McManus*, 100 Mo. 124; *Skinker v. Haagsma*, 99 Mo. 209; *Hamilton v. Boggess*, 63 Mo. 233; *Krider v. Milner*, 99 Mo. 145; *Miller v. Breneke*, 83 Mo. 163.

In addition to the character of the possession of the premises in dispute by defendant and her grantors as hereinbefore noted, there was evidence introduced tending to prove that in 1875, about the time the conveyance was made by David Woodmansee to his son Solomon, or shortly after, they together built a good substantial plank fence on the line to which defendant

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claims (it is impossible to tell from the evidence, as it appears upon the record, whether the original fence built in 1872 went clear across the lot, or only partly across, or whether the fence of 1875 was a substitute for the original fence, or a part of it, or a continuation of the old fence; at all events the line was the same). The evidence further tended to prove that the line of this fence was fixed with much care, and established between the father and son as the boundary line between their properties, and the fence built thereon at large expense, owing to the difficulty of digging the holes for the posts; that David Woodmansee and his grantees thereafter until the commencement of this suit continuously claimed as their own the strip of land sued for, lying north of and along said fence, and within their inclosure. This evidence was corroborated by the character of the occupation, and improvements made by said David on said strip, immediately along and abutting on said fence, and by evidence tending to show that Solomon Woodmansee always recognized said fence as the true boundary line between his and his father's premises, as long as he remained in possession of the lot bought of his father. In the light of this testimony it is impossible to say there was no evidence to support the finding of the court that the defendant and those under whom she claimed had been in the continuous, adverse possession of the premises for a sufficient length of time to give her title. That such possession, if proven, was adverse, is placed beyond question by the following authorities: *Handlan v. McManus*, *supra*; *Atchison v. Pease*, 96 Mo. 569; *Cole v. Parker*, 70 Mo. 372; *Walbrun v. Ballen*, 68 Mo. 164; *Krider v. Milner*, 99 Mo. 145.

II. The court committed no error in refusing a new trial on the affidavit of George Cunningham. There was no diligence whatever shown to procure his evidence on the trial.

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III. There is nothing in the point that the evidence of Nancy DeMott and Grant Wodmansee was inadmissible as an attempt to change the recitals in a deed. Their evidence tended to prove only how the land was occupied by the Woodmansees, and to what line they occupied and claimed as the boundary line between their premises. Finding no error, the judgment of the circuit court is affirmed. All concur.

WITHNELL, *Administrator*, Appellant, v. PETZOLD.

DIVISION ONE.

Monthly Tenancy: NOTICE TO QUIT: STATUTE. Section 6371 of Revised Statutes of 1889, requiring one month's notice to terminate leases, not in writing, of stores, shops, houses and other buildings in cities, towns and villages, applies to premises used as a park with buildings and fixtures thereon, situated in a city and not leased for purposes of cultivation.

104	409
55a	380
104	409
58a	114
104	409
86a	203

Appeal from St. Louis City Circuit Court.—HON. L. B. VALLIANT, Judge.

REVERSED AND REMANDED.

C. S. Taussig for appellant.

(1) The premises in question contained buildings, and Petzold's tenancy under the statute was, therefore, from month to month. R. S. 1889, sec. 6371. *First.* The doctrine of an implied tenancy from year to year has its origin in the desire to protect farmers who have planted their crops. 1 Wood on Land. & Tenant [2 Ed.] secs. 21, 22, p 93, and notes; 1 Taylor on Land. & Tenant [8 Ed.] sec. 55, and note 3. *Second.* The statute in question was passed to correct the evils which had grown out of the adoption of the English

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doctrine in this state. (2) Our courts erroneously adopted the English doctrine until it became the established law of this state, without noticing the difference between our statute of frauds and the English statute. *Kerr v. Clark*, 19 Mo. 133; *Hammon v. Douglas*, 50 Mo. 436; 1 Wood on Land. & Tenant [2 Ed.] sec. 15, p. 49, note 2. (3) The rule that a verbal letting created a tenancy from year to year was not absolute, when fully understood, but depended upon the reservation of rent whether annual or for shorter periods, the nature of the property and other circumstances of the case, making it a question, therefore, of the intent of the parties and rendering verbal holdings uncertain, to be proved or disproved in each case by evidence of intention. 1 Taylor on Land. & Tenant [8 Ed.] sec. 55, note 3; 1 Wood on Land. & Tenant [2 Ed.] sec. 21, p. 85, note 2; also, p. 53. It was to remedy these two evils that the statute in question was passed, and it should be construed liberally with a view to accomplish the purpose intended to be served, and to make tenures, which had, theretofore, depended on evidence of intent, fixed and certain. Sedgwick on Stat. [2 Ed.] p. 202; Maxwell on Stat. [2 Ed.] sec. 11, p. 84; Dwarris on Stat., p. 234; *Lynde v. Noble*, 20 Johns. Rep. 80-82; Dwarris on Stat., pp. 239, 240; *Minzer v. Diveling*, 66 Mo. 375; *Connor v. Railroad*, 59 Mo. 285.

David Murphy for respondent.

The facts of this case do not fall within Revised Statutes, 1879, section 3078. *Williams v. Deriar*, 31 Mo. 13; *Withnell v. Petzold*, 17 Mo. App. 669; *City v. Laughlin*, 49 Mo. 559. .

SHERWOOD, P. J.—Action brought October, 1884, before a justice of the peace for unlawful detainer of a piece of property situated in the city of St. Louis, known as Concordia Park, consisting of about nine acres of

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land, covering two city blocks. The plaintiff had judgment before the justice, but defendant appealed to the circuit court, where the cause was tried three times.

At the first trial the court instructed the jury to find for the plaintiff, which was done, and on an appeal to the court of appeals the judgment was reversed and the cause remanded; thereafter the circuit court tried the cause twice on the theory laid down by the court of appeals (17 Mo. App. 669), and from this third trial, begun on January 18, 1888, which resulted in a verdict for defendant, the plaintiff appealed to this court.

The property originally was that of John Withnell, the ancestor of plaintiff, the property having been devised to plaintiff as remainderman, and to his mother as tenant for life. The property was originally held by lease for three years and nine months, executed in 1875, and expiring in 1879. The property was never used nor leased for farming purposes, nor, indeed, in any respect for purposes of cultivation.

Among the provisions of the lease, showing this feature in a conspicuous manner, is the following: "That, at the expiration of the lease, all the buildings and improvements that now are, or hereafter may be, erected on said premises, together with the contents of the same, including park benches, stands, lamps, gas fixtures, and all fixtures that may be used for carrying on a public park, shall revert to, and become the property of, John Withnell, excepting only the stock in trade of the saloon on the premises, and the furniture contained therein, and the household furniture contained in the dwelling on the said premises and the shed and machinery known as the 'flying Dutchman.'"

The improvements consisted of four separate buildings, a one-story brick building on the northeast corner, used as a saloon or bar room; adjoining it on the north, a room used for a bowling alley; north of that, but disconnected, a large one-story brick building, about sixty by one hundred feet, and from forty to sixty feet high,

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used as a hall for dancing, concerts and meetings. In this building there was also a bar; next and north of the concert hall is a frame-covered alley-way, which connects the concert hall with a two-story brick building used as a dwelling and for restaurant purposes. The dwelling is a double, two-story brick, and was occupied from 1875 by the defendant and his family as a residence. In addition there were also a music stand, sheds to be used as booths, benches, tables, etc.

Section 6371, Revised Statutes, 1889, is as follows:

“A tenancy at will or by sufferance, or for less than one year, may be terminated by the person entitled to the possession by giving one month's notice, in writing, to the person in possession, requiring him to remove; all contracts or agreements for the leasing, renting or occupation of stores, shops, houses, tenements or other buildings in cities, towns or villages, not made in writing, signed by the parties thereto, or their agents, shall be held and taken to be tenancies from month to month, and all such tenancies may be terminated by either party thereto, or his agent, giving to the other party, or his agent, one month's notice in writing of his intention to terminate such tenancy.”

The only question worthy of consideration in this cause is the force and effect of the above section. Its provisions are very plain and need no interpreter. That section first became a law in 1869, and was doubtless enacted to remove all controversy as to the effect of leases by parol, and as to leases in writing when such leasing occurs in cities, towns or villages.

The statute is express that “all contracts, * * * for leasing, renting or occupation of stores, shops, tenements or other buildings in cities, towns or villages, not *made in writing*, * * * shall be held and taken to be tenancies from *month to month*.”

The statute makes no exception, and we are authorized to make none; we shall obey its commands. We do not propose by fine-spun distinctions to sanction the

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creation of leases which that statute in such plain terms forbids. Should we do so, we would be but following that unfortunate precedent set by the English courts, whereby they frittered away the wholesome prohibitory provisions of the statute of frauds, and allowed parol agreements and part performance to be substituted for that which the law said should be put down "*in black and white.*" *Kennedy v. Kennedy*, 57 Mo., *loc. cit.* 78; *Berry v. Hartzell*, 91 Mo., *loc. cit.* 137-138.

The doctrine of an implied tenancy had its origin in the desire to protect the agricultural classes; so that he who sows in peace may reap in peace. 1 Wood Land. & Tenant [2 Ed.] sec. 2122. But this necessity for protection does not exist in the facts stated here; and we are not, therefore, called upon to rule what we should do were this a case where a large farm is situated within the limits of a city, and a question should arise as to the length of time it had been rented. This case requires no anticipatory utterances on the point. There is a wide divergence between cultivating *growing crops*, and the cultivation of those industries, arts and graces which are peculiar to localities of the sort set forth in this record.

Adhering to the law as it is written, we shall reverse the judgment, and remand the cause with directions to the trial court to make inquiry as to the amount of rents, damages, etc., and enter judgment accordingly. All concur.

HIGGINS, *Appellant*, v. THE MISSOURI PACIFIC
RAILWAY COMPANY.

DIVISION TWO.

1. **Negligence: FELLOW SERVANTS.** A master is not liable to his servant for damage resulting from the negligence of his fellow servant in the course of their common employment, unless the servant causing the injury is incompetent to discharge his duty, and the master knew of the incompetency.

104	413
109	379
104	413
115	104
104	413
69	28
104	413
150	179
104	413
153	306

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2. **Railroad: FELLOW SERVANTS.** An engineer and laborer on a railroad construction train are fellow servants where they work under the same conductor, derive their authority and compensation from the same common source, and are engaged in the same general business, though in a different grade of the common service.

Appeal from St. Louis City Circuit Court.

AFFIRMED.

C. P. & J. D. Johnson for appellant.

(1) The petition states a cause of action against the defendant, and all the allegations thereof are to be taken as admitted by the demurrer. (2) Under the allegations of the petition, the engineer, whose negligence occasioned the death of the deceased, was not a fellow servant of the latter. He was the vice-principal or *alter ego* of the defendant, and the defendant is responsible for the consequences of his negligence. *Moore v. Railroad*, 85 Mo. 591; *Wood's Law of Master & Servant* [2 Ed.] sec. 438, p. 871.

Bennett Pike for respondent.

The demurrer was properly sustained. It only admitted facts properly pleaded, and not legal conclusions. The statement in the petition that it was the duty of the defendant railway company to protect the deceased as a laborer upon a construction train against danger of injury from the negligence of the locomotive engineer, in failing to ring the bell or give a signal, when he was about to start the train, is a mere conclusion of the pleader, and not the statement of an issuable fact. The same may be said of the allegation that the duty of ringing the bell, or giving a signal, when about to start the train, was delegated to the engineer, as a part of the master's personal duty to the said laborer. *Holden v. Railroad*, 2 Am. & Eng. R. R. Cases, 94, and

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cases cited and commented upon therein; *Gibson v. Railroad*, 46 Mo. 163; *Brothers v. Carter*, 52 Mo. 372; *Moss v. Railroad*, 49 Mo. 167; *Smith v. Potter*, 2 Am. & Eng. R. R. Cases, 140; *Slater v. Jewett*, 85 N. Y. 61; *Rose v. Railroad*, 58 N. Y. 217; *Moore v. Railroad*, 85 Mo. 594; *Smith v. Railroad*, 92 Mo. 369; *Railroad v. Ross*, 112 U. S. 390; *Sheehan v. Railroad*, 91 N. Y. 332; *Snider v. Railroad*, 60 Mo. 413.

GANTT, P. J.—On the thirty-first day of May, 1888, the plaintiff filed in the St. Louis circuit court an amended petition stating her cause of action, as follows.

“Now at this day comes the plaintiff, Mary A. Higgins, and by leave of court first had, files this, her amended petition; and for cause of action against the defendant, the said Missouri Pacific Railway Company, states, that the said defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Missouri, and as such owns and operates, and at the times hereinafter set forth owned and operated, locomotives and trains of cars upon and over a certain railway and tracks extending westwardly from said city of St. Louis, through the county of St. Louis and other counties, to Kansas City, in the state of Missouri.

“And plaintiff states further, that she was lawfully married to one Michael J. Higgins in the year, 1860, and continued to live and cohabit with said Higgins as his wife until on or about the ninth day of November, 1887, on which day the said Higgins departed this life.

“And the plaintiff states further, that on the said ninth day of November, 1887, the said Higgins was, and for a long time prior thereto had been, in the employ of the defendant as a laborer in and upon a construction train owned and operated by it along and upon its said railway tracks; that upon the said day the

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said construction train was at and upon what is known as Dozier Switch, a part of the said railway in the said county of St. Louis; that said train then and there consisted of seventeen or eighteen open, unguarded, flat cars, with a locomotive engine attached thereto, which said engine was used for the purpose of propelling the said train; that the said engine was then and there in charge, and under the management and control, of one Gallagher, an engineer, who was then and there and for that purpose a servant of the defendant; that one Michael Murphy, a conductor, and an agent and employe of defendant, then and there had control and direction of the movements of said train, but that the said engineer, as said servant of the defendant, then and there had the exclusive charge and management of the said locomotive, and of the stopping and starting of the said train therewith; that the said open flat cars were then and there loaded with dirt and gravel, intended to be used by the defendant for the purpose of ballasting its said tracks; that the said engineer in charge of the said locomotive engine, as aforesaid, then and there ran said train upon said switch from the main track of said railway for the purpose of permitting another train of defendant to pass over said main track at the point aforesaid; that the said Higgins was, under his employment, required to be, and was, upon one of the said unguarded flat cars; that said work and employment was hazardous, in that said Higgins and his said coemployes, who were then and there engaged in the same employment with him, were liable to be thrown from said cars by the starting of the said train without notice to them of the intended starting of the same, as the defendant then and there well knew; that the defendant was under obligations and in duty bound to protect the said Higgins and his said coemployes in their said employment on said cars, by giving to him and them timely and reasonable notice of the fact that said train was about to be started, when it was intended to

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be so started by those in charge of and managing the same ; that the defendant delegated the performance of its said duty to the said engineer in charge of and managing said engine, and for that purpose, and in pursuance thereof, it was made the duty of the said engineer to give to said Higgins and to his said coemployes on said care notice of the fact that said train was about to be started by sounding the steam whistle of said engine or ringing the bell thereof, or both sounding the said whistle and ringing the said bell ; that it was then and there and thereby the duty of said engineer, as the representative of the defendant in that behalf, to sound said whistle or ring said bell in the manner and for the purpose aforesaid, and that it had become and was the custom, at and prior to the said date, that the said engineer and other engineers in charge of the engine which was being used to operate said construction train, to give the said signals as aforesaid, and the said Higgins and his said coemployes, by reason of the premises, then and there and theretofore relied upon said signals being given, as aforesaid, as a means of protecting them against the said danger incident to the said employment, as aforesaid, all as the defendant then and there well knew ; that, notwithstanding the premises, the said engineer in disregard of his duty and of the duty of the defendant, as aforesaid, on the said ninth day of November, 1887, negligently started said locomotive engine and train while the same stood upon said track, and while the said Higgins was on one of the cars thereof, under his employment, as aforesaid, without first giving the said signal to the said Higgins and his said coemployes of the said engineer's intention so to do ; that, by means thereof, said Higgins was thrown from said car on which he was then and there standing onto the said track, and the wheels of one or more of the cars of the said train passed over him and inflicted injuries from which he then and there died.

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“ And plaintiff states further, that the said Michael J. Higgins was then and there in the exercise of reasonable care, and did not in any way contribute to the said injuries which resulted in his death. And plaintiff states further, that the said engineer was then and there, and in that behalf, the vice-principal of the defendant, and his said act and negligence was the act and negligence of the defendant.

“ And plaintiff states further, that the said Higgins, at the time of his death, was forty-seven years of age, was sound of body and mind, and capable of, and was, earning an income of \$45 per month ; that plaintiff was dependent upon him for her support and maintenance ; and that she had sustained damages, by means of the premises, in the sum of \$5,000.

“ Wherefore, she prays for judgment against the defendant for the sum of \$5,000, in accordance with the provisions of the statute in such case made and provided, together with her costs in this behalf expended.”

On the first day of June, 1888, defendant filed a demurrer to said petition, setting up the following grounds :

“ Now comes said defendant and demurs to the amended petition in the above-entitled cause filed, for the reason that same does not state facts sufficient to constitute a cause of action.

“ *Second.* Because the statement in said petition, that the said engineer of defendant was in management of the locomotive attached to the train, mentioned in said petition, by which the accident is alleged to have been caused, was the vice-principal of the defendant, is not the averment of an issuable fact, but the statement of a legal conclusion, there being no statement therein of any of the duties imposed upon said engineer, and no statement of any facts therein showing, or tending to show, that said engineer was, in any manner, in the performance of his usual duties, a vice-principal of defendant.”

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Which said demurrer was by the court, on the nineteenth day of June, 1888, sustained. Thereupon, plaintiff declining to plead further, final judgment was entered of record for defendant.

It is clear, notwithstanding the somewhat ingenious allegations of the petition, that the deceased Higgins and the engineer, Gallagher, were fellow servants. They were serving the same master, working under the same conductor, derived their authority and compensation from the same common source, and were engaged in the same general business, though in a different grade of this common service. A master is not liable to his servant for damage resulting from the negligence of his fellow servant in the course of their common employment, unless the servant causing the injury is incompetent to discharge his duty, and the master has notice of this incompetency. It is not deemed necessary to discuss at length the reasons of the rule. It is settled both upon reason and authority. *Priestly v. Fowler*, 3 Meeson & Welsby, 1; *Warner v. Railroad*, 39 N. Y. 468; *Railroad v. Murphy*, 53 Ill. 336; *Dallas v. Railroad*, 61 Texas, 196; *Dobbin v. Railroad*, 81 N. C. 446; 31 Am. Rep. 512; *Railroad v. Rider*, 62 Texas, 267; *Railroad v. Tindall*, 13 Ind. 366; *Moore v. Railroad*, 85 Mo. 588; *Sherrin v. Railroad*, 103 Mo. 378.

The demurrer was properly sustained and the judgment is affirmed. All concur.

THE STATE *ex rel.* SCOTT V. SMITH *et al.*, Judges of
Kansas City Court of Appeals.

DIVISION ONE.

1. **Jurisdiction.** By jurisdiction of the subject-matter of a cause is meant jurisdiction over the general class of actions to which it belongs.

104	419
106	9

104	419
108	8

104	419
123	532
123	538

104	419
138	537
71a	26

104	419
76a	238

104	419
84a	278

104	419
167	546

The State ex rel. Scott v. Smith.

2. ——— : COURT OF APPEALS: WRIT OF ERROR. Where a court of appeals has jurisdiction of the subject-matter of an action, the question whether the writ of error therein was issued within the statutory period is one peculiarly for that court to decide, and its ruling thereon is not reviewable by prohibition.
3. Practice: WRIT OF ERROR: TIME OF TAKING. The date when the motion for a new trial is overruled is to be taken as the starting date in computing the time within which a writ of error may issue, in an action for divorce, under Revised Statutes, 1889, section 4510.
4. Judgment, Finality of: MOTION FOR NEW TRIAL. A judgment is not considered a finality for the purposes of review during the pendency of a motion for a new trial.

Prohibition.

PEREMPTORY WRIT DENIED.

THE facts out of which this case arises are in brief the following:

On January 18, 1890, the petitioner obtained a decree for divorce from Barbara Scott, in the circuit court of Cass county, duly entered of record on that day. On January 22, 1890, she filed in that court her motion for a new trial, which was overruled January 31, 1890. On March 22, 1890 (more than sixty days after the judgment was entered of record, but less than sixty days from the time the motion for a new trial was disposed of), Barbara Scott sued out her writ of error from the Kansas City court of appeals to review the decree referred to.

The petitioner filed a motion in that court to dismiss the writ of error, for the reasons that it was not sued out within sixty days after the rendition of the original judgment, and that the court had no jurisdiction or authority to reverse, annul or modify the said judgment. That motion was overruled by that court, April 27, 1891, and the said cause was ordered and adjudged to be reversed and remanded, after hearing in due course.

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The petitioner then moved the court of appeals to vacate its order overruling his motion to dismiss, on substantially the same grounds that had been assigned in that motion. The motion to vacate is yet pending in that court.

The other facts appear in the opinion.

N. M. Givan for relator.

(1) The Kansas City court of appeals had no jurisdiction or authority to reverse, annul or modify the decree for divorce rendered by the circuit court in this case, for the reason that the writ of error was not issued within sixty days after the judgment was rendered. R. S. 1889, sec. 4510; *Judge v. Judge*, 38 Mo. 159; R. S. 1889, sec. 2275; *Ham v. Schools*, 34 Mo. 181; *Bank v. Reilly*, 8 Mo. App. 544; Freeman on Judgments, secs. 23-25; *Neall v. Hill*, 16 Cal. 145; 76 Am. Dec. 508. (2) Prohibition will lie from the supreme court to the Kansas City court of appeals to prevent it from acting in a case of which it has no jurisdiction, and the writ may also require such court to undo what it has already done. Const., secs. 3, 8, art. 6; *State ex rel. v. Court of Appeals*, 97 Mo. 276; Lloyd on Prohibition, 12, 67; High, Ex. Leg. Rem., secs. 774, 781; *State ex rel. v. Court of Appeals*, 99 Mo. 221; *State ex rel. v. Court of Appeals*, 88 Mo. 135; *State ex rel. v. Philips*, 96 Mo. 570; *State ex rel. v. Rombauer*, 101 Mo. 499; *State ex rel. v. Philips*, 97 Mo. 331; *State ex rel. v. Tracy*, 94 Mo. 217.

Whitsitt & Jarrott, R. T. Railey and J. T. Burney for respondents.

(1) The writ of error from the Kansas City court of appeals, issued within sixty days from the judgment of the Cass circuit court overruling the motion for a new trial, was in time. R. S. 1889, secs. 4510, 2248, 2275; *Thomas v. Thomas*, 64 Mo. 353; *Riddlesbarger*

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v. McDaniel, 38 Mo. 138; *Henze v. Railroad*, 71 Mo. 644; *Givens v. Van Sluddiford*, 86 Mo. 149; *Keen v. Schnedler*, 92 Mo. 525; *Randolph v. Mauck*, 78 Mo. 468; *Hurt v. King*, 24 Mo. App. 596; *Nelson v. Withrow*, 14 Mo. App. 273; *Bank v. Fletcher*, 15 Mo. App. 274. (2) Relator's object being to compel the court of appeals to grant a rehearing of the case pending before it, and to reverse its judgment therein, he should have asked for a writ of *mandamus* instead of prohibition. (3) The Kansas City court of appeals has jurisdiction of divorce cases, and it is as much its province and duty to decide the preliminary matters of practice relating thereto as to decide the merits of such controversies. It had exclusive appellate jurisdiction of the case of *Scott v. Scott*, and its action and decision thereon cannot legally be controlled by a writ of prohibition from this court. The writ of prohibition should not be used to inquire into alleged errors of the lower courts. *Wertheimer v. Mayor*, 29 Mo. 254; *Wilson v. Berkstresser*, 45 Mo. 285; *The State ex rel. v. Court of Appeals*, 87 Mo. 376; *The State ex rel. v. Burkhardt*, 87 Mo. 534; *Hagerman v. Sutton*, 91 Mo. 529; *State ex rel. v. Valliant*, 13 S. W. Rep. 398.

BARCLAY, J.—This is an application for a rule in prohibition against the judges of the Kansas City court of appeals to stay their exercise of jurisdiction over a cause in that court. The defendants resist the application, and by demurrer claim that no sufficient grounds appear for granting it.

Passing (without deciding) the question whether the application is not premature, and going directly to the merits, we find that the court of appeals has undoubted appellate jurisdiction of the subject-matter of the action pending there, by which is meant that that court, upon appeal or writ of error, has jurisdiction of causes of the general class to which that action belongs (*Posthwaite v. Ghiselin* (1889), 97 Mo. 420), namely, of proceedings for divorce.

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This being so, the question whether the writ of error (necessary to bring its jurisdiction into play in that particular case) was issued from that court in the time, manner or form allowed by law was one peculiarly for it to determine. In the circumstances disclosed in this instance, we do not regard its ruling thereon as presenting any proper matter for our review in the mode now attempted.

II. But, further than that, the statute on which the petitioner now relies declares that: "No final judgment or order rendered in cases arising under this chapter shall be reversed, annulled or modified, in the supreme or any other court, by appeal or writ of error, unless such appeal shall have been granted during the term of court at which the judgment or order appealed from was rendered, or unless such writ of error shall have been issued within sixty days after the order was made or judgment was rendered." R. S. 1889, sec. 4510.

The writ of error from the court of appeals was issued within sixty days after the order in the circuit court, overruling the motion for new trial, though more than that length of time after the date of the entry of the judgment or decree in that cause.

It has been held, with respect to appeals in other actions, under the statute requiring such appeals to be taken "during the term at which the judgment or decision appealed from was rendered" (R. S. 1889, sec. 2248), that the term at which the motion for new trial is overruled should be regarded as the term at which the judgment becomes a finality for the purposes of review, though the formal entry of judgment may have been made at a previous term. *Lane v. Kingsberry* (1848), 11 Mo. 402; *Thomas v. Thomas* (1876), 64 Mo. 353; *Givens v. Van Studdiford* (1885), 86 Mo. 149; *State ex rel. v. Philips* (1888), 96 Mo. 570.

We think that, by analogy to these rulings, the writ of error here in question should be regarded as

The State ex rel. Scott v. Smith.

having been issued within the period permitted by the statute.

It follows that the demurrer should be sustained, and the application for a rule denied. It is so ordered. SHERWOOD, C. J., concurs in denying the application. BLACK, J., concurs, as stated by him, in a separate opinion. BRACE, J., concurs on the grounds stated in the second paragraph.

SEPARATE OPINION.

BLACK, J.—This court has no appellate jurisdiction over the Kansas City court of appeals, save where a cause is certified here under section 6 of the amendment to the constitution adopted in 1883. It is true this court has a superintending control over that court by the original remedial writs ; but it is well-settled law that, when that court has jurisdiction over a cause therein pending, its jurisdiction is final, and this court has no right or power to direct and control its judgment by prohibition or otherwise. No principle of law is better settled than this, that prohibition will not be awarded for the simple purpose of correcting errors. If that court steps out of its jurisdiction, then this court may interfere ; but when that court has jurisdiction of a case therein pending on appeal or error, this court has no right to direct what judgment shall be rendered. *State, etc., v. St. Louis Court of Appeals*, 99 Mo. 216.

That the Kansas City court of appeals had full and complete jurisdiction of the case in question pending therein on error must be conceded. It had the right and was in duty bound to decide every question arising on the record before it. It was as much bound to determine the question whether the writ of error was sued out in due time as it was its duty to decide any other questions in the cause. Its judgment was as final and conclusive upon that question as upon any other question. I do not say that there was any error in the ruling

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made by that court upon the question whether the writ of error was sued out in due time, but I do say it is a matter of no consequence whether the court erred upon that question or not; for, if it did err, this court has no right to correct that error by prohibition. The courts of appeal were established for the very purpose of relieving this court of a large class of minor suits, and the constitution gives to them final appellate jurisdiction in all such cases, and their jurisdiction is final. I do not wish to be understood as speaking on this question in any compromising terms, and hence these observations on the present occasion. For these reasons I am also of the opinion the writ should be denied.

THE BREMEN SAVING BANK, *Appellant*, v. THE
BRANCH-CROOKES SAW COMPANY.

DIVISION TWO.

1. **Note : ASSUMPTION OF DEBT : ESTOPPEL.** The defendant corporation was sued on a note purporting to be signed by it as maker and one B. as indorser. It defended in its answer on the grounds that it was a manufacturing and business corporation; that its name was used by B. the then president of the corporation, for his own accommodation, and for the purpose of satisfying his prior individual debt; that the note was so executed without any consideration moving to the defendant; and that the plaintiff, when it accepted the note, had knowledge of the foregoing facts. *Held* that if the plaintiff, was induced by defendant's conduct under the circumstances to believe in good faith that the defendant had assumed to pay the debt, though it did not, in fact, assume to pay it, defendant was liable.
2. — : — : — : **PLEADING.** Such liability, although resting on estoppel, could be shown under a replication in the form of a general denial to the answer.
3. — : **BUSINESS UNDER FIRM-NAME : PREFERENCE.** Where one does business under a firm-name, he owning all the property, the debts are individual ones, and no preference exists among his creditors.

104	425
57a	120
104	425
139	332
104	425
0158	361

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4. ——— : ———. Where one doing business in his individual name and also under a firm-name borrows money on the credit of both, and afterwards organizes a corporation and transfers all his assets to it, the inference is strong that the corporation assumed the debt.
5. **Partnership, Payment of Salary Does not Constitute.** Where a person enters into a contract with another by which the latter is to receive as his salary a certain sum of money and five per cent. of the profits of the business, while the former is to own the entire capital stock, no partnership is created.

Appeal from St. Louis City Circuit Court.—HON.
DANIEL DILLON, Judge.

REVERSED AND REMANDED.

Lubke & Muench for appellant.

(1) Under the agreement read in evidence, Schulte and Fosburg were not partners in the firm of Branch, Crookes & Co. in any sense of the term. *Clifton v. Howard*, 89 Mo. 192; *Ashby v. Shaw*, 82 Mo. 76. (2) Even if the interest of Schulte and Fosburg in the net profits be considered as constituting them partners, the bank, as *bona fide* holders for value before maturity, had a perfect title to the note, and it was, as to them, a valid and binding indebtedness of Branch, Crookes & Co. *Edwards v. Thomas*, 66 Mo. 468, and *cas. cit.*; *Johnson v. McMurry*, 72 Mo. 282; *Bank v. Tinsley*, 11 Mo. App. 502. (3) Being then a valid debt of the concern of Branch, Crookes & Co., this note became likewise a valid debt against the new corporation, and a charge against all the assets swept into its coffers, whether such obligation be predicated upon the general "understanding" had between the contracting parties at the time, or arising by implication of law. *Williams v. Colby*, 24 N. Y. 793; *Slattery v. Trans. Co.*, 91 Mo. 217; *Dean v. Lead Co.*, 59 Mo. 523; *Thompson v. Abbott*, 61 Mo. 176; *Ins. Co. v. Trans. Co.*, 13 Mo. 516; *Brum v. Ins. Co.*, 16 Fed. Rep. 140; *Mt. Pleasant v.*

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Beckwith, 100 U. S. 514; *Railroad v. Boney*, 3 Law. Rep. 435, and note. (4) Independent of the conclusion contended for in the preceding point, the appellant would have the right to hold the respondent upon the note in suit, because it received the same in good faith, in exchange for a previous note held by it, of which the respondent had ample notice, and from an authorized officer. *Banking Ass'n v. N. Y., etc., Co.*, 35 N. Y. 505; *Bank v. G. A.*, 116 N. Y. 292; *Bank v. Young*, 7 Atl. Rep. 488; *Holmes v. Willard*, 24 N. Y. 260; *Bank v. Mfg. Co.*, 18 N. Y. 954; *Supervisors v. Schenck*, 5 Wall. 784; *Bank v. Stoneware Co.*, 2 Mo. App. 298; *Daniels' Neg. Inst.* [3 Ed.] sec. 386, p. 361. (5) The plea of *ultra vires* is not open to the defendant. The state alone can urge this point, in a direct proceeding, "except when the charter of the corporation not only specifies, and, therefore, limits it to, the business in which it may engage, but by express terms, or by a fair implication from its terms, invalidates transactions outside of its legitimate corporate business." *Drug Co. v. Robinson*, 81 Mo. 26, and cases cited; *Thornton v. Bank*, 71 Mo. 221; *Ins. Co. v. Hauck*, 71 Mo. 465; *Bank v. Hunt*, 76 Mo. 439; *Hovelman v. Railroad*, 79 Mo. 632; *Baker v. Loan Co.*, 36 Minn. 185; *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99.

S. N. Holliday and Boyle, Adams & McKeighan
for respondent.

(1) The defendant corporation unites with plaintiff bank in its first self-evident proposition, namely: Branch cannot be an accommodation indorser for himself; as the corporation never claimed and does not now claim any advantage from a supposed denial of such proposition, the bank's declaration of law, numbered 4, declaring that a man can be an accommodation indorser for himself, was unwarranted and uncalled for, and

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properly refused. (2) "Branch, Crookes & Co." being only the trade-name of Joseph W. Branch, prior to the formation of the defendant corporation, and such fact being known by plaintiff bank, no liability of any kind can be asserted against the trade-name, as distinguished from the person, and no relief can be awarded the plaintiff bank on the fiction involved therein. (3) This being an action at law strictly and no facts being stated in the pleadings on which equitable relief can be predicated, the court below did not err in refusing to give the bank's declaration of law, numbered 2, seeking to charge the defendant corporation with the payment of the note in suit, by reason of the simple fact that the assets of that part of Joseph W. Branch's business conducted by him under the trade-name of "Branch, Crookes & Co." were transferred to the corporation. Plaintiff cannot sue on one cause of action and recover on another. *Stix v. Matthews*, 75 Mo. 96; *Field v. Railroad*, 76 Mo. 614; *Cape Girardeau, etc., v. Kimmel*, 58 Mo. 83; *Clements v. Yates*, 69 Mo. 623. (4) Even if the pleadings warranted any such equitable relief the facts in the case, as disclosed by uncontradicted testimony, would not subject the defendant corporation to the payment of the note in controversy, because Joseph W. Branch, at the time of the transfer of the property to the defendant corporation, being then a man of large means, did not transfer to the defendant corporation all of his property, but only such as he had been employing in connection with the business carried on by him under the trade-name of "Branch, Crookes & Co." For these reasons also declaration of law, numbered 2, was properly refused. (5) Facts relied upon as an estoppel *in pais* must be specially pleaded. *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Hammerslough v. Cheatham*, 84 Mo. 21. (6) There is no ground for the doctrine of estoppel, as against the defendant corporation, in this case, because the plaintiff bank knew, when it prevailed upon Joseph W. Branch to sign the name

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of his corporation to this note, that the note represented the individual indebtedness of Joseph W. Branch, only, and the bank never surrendered or lost anything, by reason of its acceptance of the signature of the defendant corporation, and, if it did, it was not by reason of the act of the corporation, inasmuch as the corporation never acted by authority and the bank must be held to know it. Accordingly declaration of law, numbered 3, was properly refused. (7) The facts of this case entitle this defendant to raise, by answer, the defenses which it has made. Point 5 of plaintiff's counsel's brief is a misconception of the application of the doctrine of *ultra vires*. (8) The executive officer of a corporation has no power or authority to sign the name of his corporation to a bill or note for his own accommodation. Such note, if so signed, by the executive officer, is without consideration and void, when held by a party who knew at the time of receiving it, that it was the individual debt of the officer so using the name of his corporation; accordingly, the declaration of law given for defendant corporation was properly given. *Bank v. Knitting & Corset Co.*, 68 Mich. 620; *Bank v. Young*, 41 N. J. Eq. 531; *Webster v. Machine Co.*, 54 Conn. 394; *Bank v. Pottery Co.*, 34 Vt. 144; *Smead v. Railroad*, 11 Ind. 104; *Bank v. Bank*, 13 N. Y. 309; *Bank v. Stone-Dressing Co.*, 26 Barb. 23; *Bank v. Stone-Dressing Co.*, 30 Barb. 421; *Bank v. Stone-Dressing Co.*, 5 Bosw. 275; *Georgia Co. v. Castleberry*, 43 Ga. 187; Wood's Field on Law of Corporations, sec. 241.

THOMAS, J.—This is a suit at law on a promissory note, dated October 10, 1887, signed by the Branch-Crookes Saw Company as maker, and Joseph W. Branch as indorser, for \$6,500.

The corporation defends the suit on the ground that it is a business corporation, organized under the provision of our statute relating to manufacturing and

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business companies; that its name was employed by Joseph W. Branch, the then president of the corporation, in signing said note for his own accommodation; that it was so signed by him for the purpose of paying or satisfying an individual, antecedent obligation of his own, and that the same was done by him without any consideration moving to the corporation therefor and that the bank knew, when it accepted the signature of the corporation, the foregoing facts to be true. Such, in substance, is the corporation's answer. To this answer, the bank filed a general denial only. Joseph W. Branch, the other defendant, suffered default.

The facts in the case are substantially as follows:

In 1876, Joseph W. Branch entered into an agreement with two persons, named Schulte and Fosburg, for the purpose of carrying on the business of manufacturing saws. The substance of this agreement is as follows: Branch was always to own the entire capital, Schulte and Fosburg were to receive a certain sum of money and five per cent. of the profits, as their salary. Fosburg and Schulte were only in the employ of Joseph W. Branch, who owned the entire assets of the concern, and who adopted the name of Branch, Crookes & Co., as his trade-name, for the purpose of carrying on the particular business contemplated by this arrangement. Mr. Branch, at that time, and for a long time thereafter, was largely interested in many other kinds of business.

In 1880, while the arrangement aforesaid was in existence, Mr. Branch borrowed \$8,000 of the bank, and gave his own note therefor, signed by himself, individually, as maker, and by his trade-name of Branch, Crookes & Co., as indorser. The proceeds of this first note were used by Mr. Branch in other business than that conducted by him in the name of Branch, Crookes & Co.

Neither Schulte nor Fosburg ever had any knowledge of the note, or the indebtedness represented by it,

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until some time after the corporation was formed. The officers of the bank say that they believed at that time that Branch owned the entire business of Branch, Crookes & Co., and that he alone was doing business under that name; that both names were used on the note, because of a rule of their bank, that all discounted paper must have two names upon it. This indebtedness ran along, being renewed every three months, by giving a new note, from November 15, 1880, until October 1, 1886. During these years the note was renewed in all cases with Joseph W. Branch and his other name, Branch, Crookes & Co., either maker or indorser, and no other names were on the paper.

In July, 1886, the corporation, "Branch-Crookes Saw Company," was organized under and pursuant to the laws of the state of Missouri governing manufacturing and business companies. The capital of the corporation was fifteen hundred shares of the par value of \$100 each. Schulte subscribed for, and took, one hundred shares; Fosburg, fifty shares; J. C. Branch, fifty shares; Medairy, one share, and Joseph W. Branch, the remainder.

When the corporation was formed it took a transfer to itself of that part of the property of Joseph W. Branch which, before that time, he had owned in connection with the business carried on by him under the trade-name of Branch, Crookes & Co., and the corporation issued its stock in consideration of that transfer. There was no agreement made at the time requiring the corporation to pay the debts of Mr. Branch, or even those obligations of his outstanding, in connection with the business of Branch, Crookes & Co.

The following is the paper which represented the idea of the parties at that time, that is to say:

"In consideration of the issuance to me of fifteen hundred shares of the capital stock of the Branch-Crookes Saw Company, full paid, I hereby sell, assign and transfer to said company \$150,000 of the assets and

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property of Branch, Crookes & Co., whereof I am sole owner. The particular assets hereby assigned appear on the books of said Branch, Crookes & Co., and of said Branch-Crookes Saw Company

"In witness whereof I have hereunto set my hand and seal this tenth day of July, 1886.

"[Signed.]

JOSEPH W. BRANCH."

On the first day of October, 1886, the old note had to be paid or again renewed. It had at that time been reduced to \$7,000. Joseph W. Branch renewed the note on that day by signing his own name as maker and the Branch-Crookes Saw Company as indorser. The note was again renewed in the same way on the third day of January, 1887, and on the sixth day of April following. When the note became due in July, Joseph W. Branch was financially embarrassed. He had been president of the defendant corporation all the time and continued to be such up to the time of the trial of this case in the circuit court.

His son, Joseph C. Branch, was vice-president and R. L. Fosburg was treasurer and secretary. Fosburg, however, retired from the concern in June, 1887, both as stockholder and officer, and was succeeded in the offices of treasurer and secretary by Joseph C. Branch. So that on July 8, 1887, when the note renewed April 6, 1887, became due, Joseph W. Branch was president, Joseph C. Branch, vice-president, treasurer and secretary, and Medairy a director and bookkeeper of this corporation. A meeting of the board of directors of the plaintiff bank was held a short time before this note became due, and Joseph W. Branch was called and appeared before it. The bank held his obligations on accounts other than the note in controversy. He said to the board, he could not pay the other notes, and added, "I cannot pay anything, but that note is good because that company is good. It has no other debts than this note, and it ought to be paid."

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On the eighth day of July, 1887, the note was duly protested for non-payment, and notice of non-payment served on Medairy at the company's office in St. Louis. Mr. Joseph W. Branch went to the director's room of the bank and Prauge, the president, and Nacke, the vice-president, said to him, "The note ought to be paid by the company," to which Mr. Branch replied, "Yes, it ought, or at least renewed." Mr. Prauge said that if it was renewed he would like to have the corporation become maker, because Branch and Crookes originally got credit for it. Mr. Branch at first objected to this, but finally consented, saying, "Any way you please; any way you please." Branch drew a check in the name of defendant corporation for \$500 as a payment on the note, and then executed a note for \$6,500, payable ninety days after date, signing the name of defendant as maker and his own name as indorser. The bank delivered to Branch the old note. The note fell due October 10, 1887, and was again renewed by Joseph W. Branch in the same way for ninety days, and the old note was delivered to Branch. This note dated October 10, 1887, is the one now in controversy. On October 10, 1887, Joseph W. Branch made a general assignment for the benefit of his creditors.

At the instance of defendant company and against the objection and exception of plaintiff, the court granted the following instruction: "If the court, sitting as a jury, finds the facts to be that on November 15, 1880, Joseph W. Branch presented his note to the plaintiff for \$8,000, made by him and indorsed by Branch, Crookes & Co., composed either of himself exclusively, or of himself and one Fosburg and Schulte, and that the plaintiff received said note and paid the money therefor less the discount, either to Mr. Joseph W. Branch, or Branch, Crookes & Co., and if the debt represented by this note was from time to time renewed with substantially the same maker and indorser until

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the year, 1886, and if on October 1 of that year, after the defendant had become incorporated, Mr. Joseph W. Branch, upon the maturity of the last preceding renewal of said note, gave a new note with his own name as maker, and that of the defendant corporation as indorser, and if the note so given on October 1, 1886, was again renewed January 3, 1887, with like maker and indorser; and on April 6, 1887, with like maker and indorser, and on July 8, 1887, at the request of plaintiff, renewed by placing the corporation's name as maker on this note and Joseph W. Branch's name as indorser; and if on October 10, 1887, a further renewal note, being the one in suit, was given for the same debt or part of it, with the name of the Branch-Crookes Saw Company, defendant corporation, as maker and Joseph W. Branch as indorser; and if the court further finds that when this last note was so given to the plaintiff, and when the first note of date, October 1, 1886, indorsed by Branch-Crookes Saw Company, was first given to the plaintiff, the plaintiff knew that the note and notes bearing the name of defendant corporation were given to it, by way of a renewal of the note so originally given in 1880, and so subsequently renewed as hereinbefore stated, then the plaintiff cannot recover in this action, unless the court further finds as a fact that at the time of the formation of the defendant corporation and the sale of the assets of Branch, Crookes & Co. to it, that the defendant thereby agreed to assume and to pay this, the said debt so due to plaintiff or did agree to pay liabilities of said Branch, Crookes & Co., among which this said debt due plaintiff was included, as a part of the consideration for its purchase of the assets of said Branch, Crookes & Co., and the burden is upon the plaintiff to prove that the corporation defendant did for the consideration aforesaid assume the payment of said particular debt."

At the instance of plaintiff, the court granted the following instruction or declaration of law: "1. The court, sitting as a jury, declares the law to be that, if it

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appear from the evidence that, at the time when the assets and property of Branch, Crookes & Co. were transferred to the defendant saw company, it was agreed between said defendant and Joseph W. Branch, the then owner of said assets and property, as part consideration for such transfer, that defendant saw company should assume and pay all liabilities that said Branch might then owe under the name of Branch, Crookes & Co., and that thereafter, in pursuance of such agreement, said Branch affixed the name of said saw company to the note in suit, and to the note or notes of which the same is a renewal, then the defendant saw company is liable in this action, and the judgment should be for the plaintiff in the amount of note sued on, with interest from its maturity at the rate of eight per cent. per annum."

And plaintiff also asked the court to grant the following instructions, or declarations of law, which the court refused, plaintiff excepting: "2. The court, sitting as a jury, further declares the law to be, that if it appear from the evidence that, after the incorporation of the defendant saw company, it entered into contract with defendant Branch to purchase and assume from him all the assets and property theretofore owned and used by said Branch, in the business of manufacturing saws, under the business name of Branch, Crookes & Co., and under such contract received, assumed and used all such assets and property, then the law holds said saw company liable for any and all indebtedness that said Branch had theretofore legally incurred in such name of Branch, Crookes & Co., whether the defendant company at the time of the transfer was informed of such indebtedness or not.

"3. The court, sitting as a jury, further declares the law to be, that, if it appear from the evidence that, when the defendant saw company's name was first indorsed upon the series of notes shown in evidence, plaintiff in good faith believed that such note was

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either for an indebtedness, legally owing or assumed by defendant saw company, or that defendant Branch was duly authorized to affix the name of the saw company thereto, and did in good faith, and without notice of the want of authority of said Branch, if any, or of the fact that such debt had not been legally assumed by defendant company (if such be found to be the fact) accept said note, and in consideration thereof deliver up for cancellation the note then previously held by it, and that the subsequent notes, including the note sued on, were executed by defendants and accepted by plaintiff under like circumstances, in like good faith, without notice, and upon the delivery up of previous notes, then the finding must be for plaintiff.

“4. The court further declares the law to be, that the agreement between Branch, Fosburg and Schulte, read in evidence, did not constitute said persons partners in law, and that under said agreement the defendant Branch was not restricted from using the name of Branch, Crookes & Co., for accommodation indorsements.”

Judgment was rendered against Branch for the amount of the note in favor of the Branch-Crookes Saw Company, and plaintiff appeals.

I. The instructions given and refused indicate very clearly the theory upon which the trial court determined this controversy. The instructions given base plaintiff's right of recovery solely on the ground that the defendant corporation in fact assumed to pay this debt as a part of the consideration of the purchase of the assets of Branch, Crookes & Co. This was error. Plaintiff is entitled to recover upon another hypothesis presented by the evidence. If it was induced by the conduct of the officers and stockholders of defendant and by the facts connected with the history of the note, prior to October, 1886, to believe, and it did in good faith believe, that the defendant had in *any* way and for *any* consideration assumed to pay the debt, and was liable

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for it, and, so believing, it took the notes of July 8, and October 10, 1887, in each case unconditionally extending the time of payment for ninety days, and delivering up the old notes, then it was a *bone fide* holder for value of the note in suit, and it ought to recover, notwithstanding the fact that defendant did not in form or in fact assume the debt. *Deere v. Marsden*, 88 Mo. 512; *Crawford v. Spencer*, 92 Mo. 498; *Fitzgerald v. Barker*, 96 Mo. 661; *Mech. Banking Ass'n v. N. Y., etc., W. L. Co.*, 35 N. Y. 505; *National Park Bank v. G. A., etc.*, 116 N. Y. 292; *National Bank of Republic v. Young*, 7 Atl. Rep. 488; *Holmes v. Willard*, 24 N. Y. 260; *Second National Bank v. Mfg. Co.*, 18 N. Y. 954; *Supervisors v. Schenck*, 5 Wall. 784; *La Fayette Savings Bank v. Stoneware Co.*, 2 Mo. App. 299; *Daniels' Neg. Inst.* [3 Ed.] sec. 386, p. 361.

We do not regard the authorities cited by respondent as in conflict with the doctrine stated above. In all of them the parties taking the notes knew they were accommodation notes. If the bank in this case knew that the debt was the sole debt of Branch, it cannot recover. It may be conceded that it knew the original debt was Branch's alone; but upon the evidence in this record there are clearly two sides to the question, whether it had good cause to believe, and did in good faith believe, that defendant had assumed to pay the debt. On the one hand it knew that Joseph W. Branch and Branch, Crookes & Co. were the same person, and hence that the debt was created for the former. When the note was renewed three times after the organization of defendant, it took it with Branch as maker and the defendant as indorser, and when the form of the note was changed in July, 1887, it insisted on defendant becoming the maker instead of indorser. Branch objected to this, at first, but finally yielded. On the other hand the bank officers did not know that Branch used the money in his business outside of the saw business.

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Defendant's counsel assume that it was proved beyond controversy, that they did know this, but in this they are mistaken. These officers all testify that they did not know what Branch did with the money. It is true J. C. Gerichten, the cashier and teller, testifies that after the proceeds check of the note was returned to his bank he might have inferred that Branch used the money for his private purpose, simply because his name appeared as the last indorser, but he himself adds that he did not know how Branch disposed of the money. Branch carried on business in a dual capacity. The saw business involved his most important interests, and this was carried on in the name of Branch, Crookes & Co. In 1886, when the corporation was organized, Joseph W. Branch retained twelve hundred and ninety-nine shares of the stock out of a total of fifteen hundred. This represented \$129,900, while the other shares represented only \$20,100. Of this last sum his son, Joseph C. Branch, owned fifty shares worth \$5,000. Fosburg who owned \$5,000 of the stock sold out in June, 1887, but the evidence does not disclose the name of the party to whom he sold. Joseph W. Branch was president of the corporation, his son, Joseph C., was vice-president up to June, 1887, and he then became treasurer and secretary also. In July, 1887, when the note was put in the form it finally assumed, Branch informed the board of directors of the bank, that this was the only debt the corporation owed, and that it was good, because the corporation was good. Branch owed other sums to the bank, but there was no pretense, either by the bank or Branch, that the corporation was liable for any of these, thus clearly implying that all parties recognized the *status* of the debt in controversy as being different from the other obligations of Branch.

The note was protested July 8, 1887, and when Branch went to the bank to arrange about it the officers had a right to presume that the corporation had notice of the protest and that Branch had authority to act in

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the premises. Indeed, the notice of the protest was served on Medairy, a director, and the bookkeeper of the concern. No action was taken by the corporation, and the matter was allowed to run on in this way till the note was renewed in October and the final crash came, and Branch went under financially. Branch constituted the firm of Branch, Crookes & Co., and when all the assets belonging to Branch under the trade-name were transferred to the corporation, the bank officers no doubt believed that Branch was virtually the corporation as he had been Branch, Crookes & Co. Indeed, that was true. Fosburg says, the directors never called Branch to account, nor even asked him what he was doing. If the bank officers had desired to get the real facts in connection with this debt in its relation to defendant, they would have gone of course to Branch, its president and the owner of nearly all its stock. It was peculiarly within his knowledge whether this was a debt of the corporation or not. He told the board of directors this was a debt of the corporation. The son, Joseph C. Branch, said he knew this note was given, and it ought to be paid; that the company was not fighting it, but payment was resisted by some of the bondsmen of the elder Branch who held the latter's stock to secure them.

If it be a fact that the corporation never assumed this debt, and, for that reason, ought not to pay it, it is manifest that somebody must be the loser, and "it is more reasonable that he that employs and puts confidence in a deceiver should be a loser rather than a stranger." *Edwards v. Thomas*, 66 Mo. 468. We do not desire to be understood as holding that the good faith of the bank in this transaction is proved, but we refer to these salient points for the sole purpose of showing that there is substantive evidence tending to prove it, and this issue ought to be squarely submitted to the triers of the fact by an appropriate instruction. Instruction, numbered 3, prayed by the plaintiff and

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refused by the court, modified to conform to the views expressed herein, ought to be given on another trial of the case.

• II. It is contended by defendant that instruction, numbered 3, above quoted, sets up facts which must operate by way of estoppel *in pais* alone, and as the plaintiff had not pleaded an estoppel, no issue of that character was raised and for that reason this instruction ought to have been refused. We do not concur in this view. The answer admits that the defendant corporation executed the note in suit and undertakes to avoid its payment by averring that the debt evidenced by the note was the debt of Branch; that the note was taken for the accommodation of Branch; that Branch had no authority to sign the name of the corporation, and that the note was without consideration moving from the bank, all of which was known to the bank. To this answer plaintiff filed a general denial. Under this state of the pleading it was competent for plaintiff to prove its good faith in taking the note, and that it had reason to believe, and did believe, that defendant had assumed the debt and was liable for it. In fact this issue grows out of the history of the transaction as proven by defendant and plaintiff unquestionably has the right to complete the history, only partially given by defendant.

III. Instruction, numbered 2, as prayed by plaintiff, does not declare the law as applicable to the facts of this case. The debts created by Branch for the business carried on under the name of Branch, Crookes & Co. and his other debts stand upon the same footing in relation to all his property. A firm creditor has a preference over a separate creditor in the distribution of the partnership property. But this is predicated solely on the fact that there is joint property. Where there is no joint property, there is, of course, nothing on which the rule can operate. Here the property all belonged to Branch, individually, and, in such case,

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all debts are the debts of Branch, and no one can be preferred over another. *Miller & Co. v. Creditors*, 37 La. Ann. 604; *Scully's Appeal*, 7 Atl. Rep. (Pa.) 588; 1 Bates on Part., sec. 106.

While this is the legal effect of this transaction, the fact that Branch carried on business in his own name and also in the name of Branch, Crookes & Co., and borrowed money originally on the credit of both names, and that afterwards all the assets of that part of his business carried on under the name of Branch, Crookes & Co. were bodily "swept" into the corporation, the only change made being the substitution of the word "saw" for "and" in the firm-name, is an important factor in the trial of the issue of the good faith of the bank in taking the note in controversy. The inference that this debt of Branch, Crookes & Co. was carried with the assets, into the corporation, would be very strong.

IV. We do not know upon what theory instruction, numbered 4, prayed by plaintiff, was refused. It is conceded in this court by both parties, and the concession seems to be supported by *all* the evidence, that Branch had no partner in the saw business and that the articles of agreement between him, Schulte and Fosburg did not constitute a partnership in a legal sense. We think that instruction ought to have been given.

The judgment of the circuit court is reversed, and the cause remanded for new trial. All of this division concur.

THE STATE V. SHROYER, *Appellant*.

DIVISION TWO.

1. **Rape, Assault to Commit: VIOLENCE.** It is not necessary to constitute an assault with intent to rape that actual violence should have been used.

104	441
106	400
104	441
111	525

104	441
115	438
104	441
118	174

101	441
59a	800
104	441
131	531

104	441
132	103

104	441
78a	160
104	441
84a	211

104	441
174	*618
174	*619
174	*621

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2. ——— : ———. It is not even necessary that the person of the one upon whom the attempt is intended should be touched. If the intent with the present means of carrying it into effect exists and preparations therefor have been made the assault is complete.
3. ——— : ———. It is immaterial in such case whether the sexual connection was to be accomplished by actual physical force or while the victim was asleep.
4. ——— : EVIDENCE : REPUTATION OF DEFENDANT. Where a defendant in such case testifies in his own behalf, his general reputation for virtue and chastity may be assailed by the state.
5. Criminal Practice : REOPENING CASE : JUDICIAL DISCRETION. The refusal of the trial court to reopen the case to permit a defendant to offer additional evidence will not afford a ground for reversal, where it does not appear that the discretion of the court was unfairly or unsoundly exercised.
6. ——— : INSTRUCTIONS : ALIBI. The general instruction given to the jury in this case that if they had reasonable doubt of defendant's guilt they should acquit him *held* to have sufficiently embraced the law arising on the effect of the evidence offered tending to prove an *alibi*.

Appeal from Holt Circuit Court. — HON. C. A. ANTHONY, Judge.

AFFIRMED.

T. C. Dungan for appellant.

(1) The court should have given the instruction asked at close of evidence for the state, as there was no evidence of any assault, or attempted force, or of an intent to commit a rape, and the verdict is entirely unsupported by the evidence. *State v. Burgdorff*, 53 Mo. 65; *State v. Mansfield*, 41 Mo. 470; *State v. Marshall*, 47 Mo. 378; *State v. Perkins*, 11 Mo. App. 82; *State v. Priestly*, 74 Mo. 24; *Burney v. State*, 21 Texas App. 565, and cases cited; *Milton v. State*, 4 S. W. Rep. (Texas) 574; *Turner v. State*, 5 S. W. Rep. (Texas) 511; *McCullough v. State*, 5 S. W. Rep. (Texas) 839; *State v. Hagerman*, 47 Iowa, 151; *State v. Canada*, 27 N. W. Rep. (Iowa) 288; *State v. Kendall*, 34 N. W. Rep. (Iowa) 843; *Coleman v. State*, 9

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S. W. Rep. (Texas) 609; 35 Texas, 481; *Jones v. State*, 8 South. Rep. (Ala.) 383. (2) The defendant's reputation for chastity and virtue was not in issue, and the evidence admitted thereon by the court against defendant's objection had a tendency to influence the jury to the prejudice of the defendant, as he was on trial for an offense involving a want of chastity, and the court erred in admitting the evidence. *State v. Clawson*, 30 Mo. App. 139; *Carthaus v. State*, 47 N. W. Rep. (Wis.) 629. (3) The first instruction given for the state was wrong—an assault could not be made by crawling or moving up beside prosecutrix, or so near to her that he could touch her, or by simply touching her person while sleeping, after crawling or moving up beside her, or so near to her. *Carroll v. State*, 6 S. W. Rep. (Texas) 190, and cases cited; *Johnson's Case*, 18 Texas App. 385; *Jones v. State*, 18 Texas App. 485; *Burney v. State*, 21 Texas App. 565. (4) The second instruction for the state was also erroneous. *Carroll v. State*, 6 S. W. Rep. 190. (5) Instruction, numbered 3, asked by defendant, defining an assault, should have been given, and the court erred in refusing same. *Carroll v. State*, 6 S. W. Rep., *supra*, and cases cited. (6) The court should have given an instruction on the effect of the evidence adduced tending to prove an *alibi*. *Coleman v. State*, 9 S. W. Rep. (Texas) 609; *State v. Howell*, 100 Mo. 628. (7) The court erred in overruling defendant's motion for a new trial, for the reason therein stated. See authorities above cited. (8) The court also erred in overruling defendant's motion in arrest of judgment. *Coleman v. State*, 9 S. W. Rep. (Texas) 609; *Hamilton v. State*, 11 Texas App. 116; *Turner's Case*, 24 Texas App. 12.

John M. Wood, Attorney General, for the State.

(1) The indictment charges the offense substantially in the language of the statute, and is sufficient.

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R. S. 1879, sec. 1263; *State v. Meinhart*, 73 Mo. 562; *State v. Little*, 67 Mo. 624; *State v. Smith*, 80 Mo. 516. (2) Instructions, numbered 1 and 2, given by the court on the part of the state, and numbers 1 and 2, given at the request of the defendant, properly declared the law as to the offense charged. *State v. Smith*, 80 Mo. 516; *State v. Eddings*, 71 Mo. 545; *State v. Montgomery*, 63 Mo. 296. (3) The third, fourth and fifth instructions given on the part of the state, in relation to the credibility of the witnesses, defendant's testimony and reasonable doubt, are the usual instructions given upon those subjects. (4) The third instruction prayed for by the defendant was properly refused. In the case of *State v. Smith*, 80 Mo. 516, the court says: "An assault with intent may exist without the actual attempt. There need not be a direct attempt at violence, but indirect preparation toward it will in certain circumstances constitute an assault." The court, in instruction, numbered 2, given on the part of the state, defined the term assault in accordance with the law announced in *State v. Smith*, *supra*. (5) The instructions as a whole fairly presented the law of the case to the jury, and this court will not reverse for any slight defect or impropriety in any particular instruction. *State v. McClure*, 25 Mo. 338; *State v. Hopper*, 71 Mo. 425; *Noble v. Blount*, 77 Mo. 235. (6) The court did not err in refusing to reopen the case, and to allow defendant to introduce evidence as to his character a day after he had closed his case. This is a matter within the discretion of the court. *Pearce v. Danforth*, 13 Mo. 360; *Harvey v. Brooks*, 36 Mo. 493; *Van Studdiford v. Hazlett*, 56 Mo. 322; *Nelson v. Betts*, 21 Mo. App. 219.

MACFARLANE, J.—Defendant was indicted, tried and convicted of an assault with intent to commit a rape upon Armintha Murphy.

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The circumstances of the assault, as gathered from the evidence, were in substance as follows : The house of Patrick Murphy consisted of two rooms, the one on the south fronting the road, and the other north of it. At the time of the assault Patrick Murphy was absent from home. His children, Catherine, the eldest, Arminta, about fourteen years of age, and two sisters and a brother, all younger than Arminta, were at home. On the night of August 23, 1876, these children all slept in the south room of the house. This room had a door in the south, and a window on each side of the door. The night being very warm all the children, except Catherine, slept on the floor. Catherine was upon the bed. The door was left open.

Catherine, the only witness who saw the alleged assault, testified : "I first heard a noise, heard the door sill creak, but thought it was the dog. I looked round and saw the defendant, saw Shroyer, on his hands and knees in the door ; he crawled to brother, laid his hand on him, and then crawled round about their feet to Alice, who was lying in the middle, and touched her, then crawled over to Arminta, crawled up by the side of her, and put his hand on her arm ; none of them moved. Arminta was lying on her left side with her face towards the east, he was lying close to her on the east side, with his face towards her face, when he was lying down, lying just up against her. He lay that way for a minute, then he kind of raised partly up and looked round the room. Then he took his left hand and begun to unfasten his pants. The moon was shining out doors and he was almost between me and the door. I could see that he was unbuttoning his pants. I hallooed and he lay down again as if to hide, and was still a moment. I hallooed again ; he then partly rose, crawled towards the door quickly on his hands and knees ; as he got about the door, he rose up on his feet and went out."

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I. Defendant insists that the evidence did not sustain the charge of the indictment, and does not justify the verdict. It was not necessary in order to constitute an assault, that actual violence should have been used. To sustain such an indictment it is not even necessary that the person of the one upon whom the attempt is intended should be touched. If the intent, with the present means of carrying it into effect, exists, and preparations therefor have been made, the assault is complete. *State v. Smith*, 80 Mo. 518; *State v. Montgomery*, 63 Mo. 296; *State v. Eddings*, 71 Mo. 545; 1 Whart. Crim. Law, sec. 576.

It was the evident intention of defendant to have connection with the girl without her consent, and whether it was to be by actual physical force, or during the unconsciousness of sleep, is wholly immaterial. There could have been no consent while the intended victim slept. *State v. Eddings*, 71 Mo. 545; *Queen v. Dee*, 31 Alb. L. Jour. 43; *Reg. v. Meyers*, 12 Cox. Crim. Cas. 311; *Harvey v. State*, 14 S. W. Rep. 645; *State v. Smith*, 80 Mo. 518, and authorities cited. The acts and conduct of defendant left no doubt of his criminal intent.

II. Defendant testified as a witness, upon the trial in his own behalf, and, in rebuttal, the state introduced evidence to discredit his testimony. The impeaching witnesses were permitted, over defendant's objection, to testify as to defendant's general reputation for virtue and chastity. Defendant claims that error was committed in doing so.

The authorities are not harmonious on this question. It is held in some states that the impeaching testimony must be confined to the reputation of the witness for truth and veracity, and in others that it may be properly extended to general moral character, and in others, again, to moral character in particular respects. A collection of the authorities may be found in 30 Cent. Law Jour. 241. This court has followed

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the rule that, in discrediting a witness, the inquiry may not only be extended to his general character, but to his character in respect to particular matters, as sobriety and chastity. *State v. Shields*, 13 Mo. 236; *State v. Grant*, 76 Mo. 236; *State v. Rider*, 95 Mo. 486. This rule seems to be in conflict with the current of authority, but no reason can be seen why it should be changed. The *Rider* case above cited allows the reputation for chastity to be shown to discredit a male as well as a female witness, contrary to an intimation of this court in the *Grant* case, 36 Mo. 236. That there should be a distinction made between the sexes in this respect cannot be justified on the grounds usually given. If it be true that the general character of a man is not affected by his reputation for unchastity, the evidence of such reputation will do him no injury.

III. The day after both parties had closed their case, defendant asked the privilege of introducing other testimony in support of the reputation of defendant for truth and morality. This the court refused, and its action is assigned as error. This was a matter almost entirely within the discretion of the court, and it does not appear that the discretion was unfairly or unsoundly exercised and its action is not cause for reversal. *Harvey v. Brooks*, 36 Mo. 493; *Van Studdiford v. Hazlett*, 56 Mo. 322. The reputation of a witness is always open to attack without notice to the opposite party. A party should come prepared to meet such attacks. Particularly should this be the case where a party to a suit or prosecution intends to testify in his own interest.

IV. The instructions given the jury by the court are fair and properly declare the law. The only objection specially urged to them is in the fact that they authorized the jury to find an assault under the facts detailed in the evidence. This raises the same question already disposed of in considering whether the verdict was justified under the evidence, and need not be considered further.

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V. Complaint is made that the court did not instruct the jury "on the effect of the evidence tending to prove an *alibi*." Without going into a consideration of the scope of that provision of the statute imposing upon trial courts the duty of instructing the jury upon all questions of law, "which are necessary for their information in giving their verdict," we deem it sufficient to say that the jury needed no information, and it was not necessary to instruct them, that, if defendant was not present at Murphy's house on the occasion of the assault, he was not guilty of making the assault. The general instruction given to the jury, that if they had a reasonable doubt of defendant's guilt they should acquit him, sufficiently covered the law arising on the "effect of the evidence tending to prove an *alibi*."

No error being found in the record, the judgment is affirmed. All concur.

JACKSON V. THE MISSOURI PACIFIC RAILWAY
COMPANY, *Appellant*.

DIVISION ONE.

1. **Master and Servant: ORDINARY RISKS: RAILROAD.** When a railroad company is in the habit of receiving and transporting cars laden with timbers and iron rails projecting over the laden cars, the risk arising therefrom is the ordinary one assumed by a brakeman engaged in the company's service.
2. — : — : —. Nor is the foregoing rule inapplicable because the company's train dispatcher directed the brakeman to go with a locomotive and tender on a sidetrack on which the dangerous car stood and with which the tender collided, thereby causing the injury, it not appearing what the duties of the train dispatcher were, nor that he knew of the location of the dangerous car on the sidetrack, or of its being laden with projecting rails.

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Appeal from Bates Circuit Court.—HON. JAS. B. GANTT, Judge.

REVERSED.

H. S. Priest for appellant.

(1) The deceased's contributory negligence should defeat a recovery. This should be so ruled, upon elementary principles, upon an intelligent understanding of the uncontroverted facts. *Darracutts v. Railroad*, 31 Am. & Eng. R. R. Cases, 157. (2) The projection of iron rails, timbers, etc., over the ends of cars, was risk of the service in which the deceased was engaged. Beach on Cont. Neg., sec. 138; *Railroad v. Johnson*, 112 Ind. 355; *Day v. Railroad*, 2 Am. & Eng. R. R. Cases (Mich.) 126; *Railroad v. Plunkett*, 2 Am. & Eng. R. R. Cases (Kan.) 127; *Railroad v. Hussen*, 12 Am. & Eng. R. R. Cases (Pa.) 241; *Railroad v. Brice*, 28 Am. & Eng. R. R. Cases (Ky.) 542; *Railroad v. Gowen*, 31 Am. & Eng. R. R. Cases (Tenn.) 168; *Scott v. Railroad*, 28 Am. & Eng. R. R. Cases (Or.) 414; *Boyle v. Railroad*, 23 N. E. Rep. (Mass.) 827; *Lathrop v. Railroad*, 23 N. E. Rep. (Mass.) 227; *Meyers v. Iron Co.*, 150 Mass. 125; *Kennedy v. Railroad*, 17 Atl. Rep. (Pa.) 7; *Nash v. Steel Co.*, 62 N. H. 406; *Railroad v. Somers*, 9 S. W. Rep. (Tex.) 741; *Woods v. Railroad*, 40 N. W. Rep. (Minn.) 510; *Judkins v. Railroad*, 14 Atl. Rep. (Me.) 735; *Darracutts v. Railroad*, 31 Am. & Eng. R. R. Cases (Va.) 157. (3) The instructions given at the request of the plaintiff are wrong. They affirm a liability without respect to risk of service. They are misleading, in that they refer to abstract principles of law not at all involved in this matter. They affirm a liability with respect to negligence in leaving the car of iron standing upon sidetrack, when the petition concedes that was the proper place for it.

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They affirm a liability if the "cars" so loaded were unsafe and dangerous in coupling and uncoupling, without reference to the usual risks attending such work.

Adams & Buckner also for appellant.

(1) Where the facts of a case are undisputed, it is a question for the court to determine whether or not the facts proven constitute negligence. *Kelly v. Railroad*, 11 Mo. App. 1; *Yancy v. Railroad*, 93 Mo. 433; *Bell v. Railroad*, 86 Mo. 599; *Zimmerman v. Railroad*, 71 Mo. 476; *Lenix v. Railroad*, 76 Mo. 86; *Moody v. Railroad*, 68 Mo. 470. (2) Where the undisputed evidence shows a clear case of contributory negligence, the duty of the court is to take the case from the jury. Authorities above cited. (3) The act of deceased in assuming the position he did assume in this case under the circumstances was an act of gross negligence. (4) The act of leaving cars improperly loaded on the track was not negligence. (5) The act of loading cars and the act of leaving them loaded upon the track was the act of a fellow servant for which the defendant would not be liable even if it was a negligent act. (6) The deceased was guilty of gross contributory negligence which directly contributed to his death, and the act of which respondent complains was the act of a fellow servant; hence under all the evidence he was not entitled to recover.

James T. Burney and *R. T. Railey* for respondent.

(1) It is the duty of defendant to use reasonable and ordinary care in securing competent men, under whom Frank Lee Jackson was required to work; to see that the machinery, track and other appliances, with which he was required to work, were reasonably safe; to warn him of unusual or extreme danger, in the line of his duty, if known to itself, and unknown to

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him—in order that he might refuse to incur the hazard of said danger. The failure to perform--through its servants or otherwise—any of the duties aforesaid, on account of which injury might be sustained, would be actionable negligence on the part of defendant. In consideration of the foregoing, said Jackson agreed to assume all the ordinary risks incident to the business in which he was to engage, including the negligence of fellow servants, except where the latter were performing some duty which defendant owed said Jackson. Tested by these propositions, Jackson was killed by the failure of defendant to perform its plain duty. *Paulmier v. Railroad*, 34 N. J. L. 152; *Anderson v. Bennett*, 38 Am. & Eng. R. R. Cases (Oregon) 97, where numerous authorities and precedents are cited and discussed; Wood's Law of Master and Servant [2 Ed.] secs. 354, 355; *Baxter v. Roberts*, 44 Cal. 188. (2) It was the duty of defendant to exercise reasonable care, in seeing that the cars left upon its switch and sidetracks were not in an unsafe and dangerous condition for brakemen who were required to couple and uncouple cars upon said tracks in the night time, and to give warning of their condition, and whoever was required by defendant to represent it, in the performance of the duties aforesaid, occupied the same relation to said Jackson that defendant itself would have occupied, had it been performing its duties aforesaid through its personal representatives. *Gibson v. Railroad*, 46 Mo. 169; *Lewis v. Railroad*, 59 Mo. 499; *Whalen v. Church*, 62 Mo. 328; *Dale v. Railroad*, 63 Mo. 458; *Long v. Railroad*, 65 Mo. 229; *Porter v. Railroad*, 71 Mo. 72; *Hall v. Railroad*, 74 Mo. 298; *Covey v. Railroad*, 86 Mo. 639; *Waldhier v. Railroad*, 87 Mo. 48; *Huhn v. Railroad*, 92 Mo. 450; *Reagan v. Railroad*, 93 Mo. 348; *Gutridge v. Railroad*, 94 Mo. 474; *Bowen v. Railroad*, 95 Mo. 278, and cases cited; *Stephens v. Railroad*, 96 Mo. 212; *Barry v. Railroad*, 98 Mo. 67; *Brown v. Railroad*, 15

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Am. & Eng. R. R. Cases, 276. (3) We have demonstrated by the authorities cited under proposition 2, that defendant was guilty of actionable negligence, and failed to perform a personal duty which it owed Jackson. It is immaterial whether the person, to whom they had delegated power to represent them in any duty which they owed him, was a fellow servant of Jackson, or not. We insist, however, that the train dispatcher, who was representing defendant and gave the orders, was not a fellow servant of Jackson. *Smith v. Railroad*, 92 Mo. 359, and cases cited; *Dana v. Railroad*, 92 N. Y. 639; *Darrigan v. Railroad*, 23 Am. & Eng. R. R. Cases (Conn.) 438; *Lewis v. Seifert*, 116 Pa. St. 649, and cases cited; *Flike v. Railroad*, 53 N. Y. 549; *Railroad v. Henderson*, 5 Am. & Eng. R. R. Cases, 529; *McKinne v. Railroad*, 21 Am. & Eng. R. R. Cases, 539; *McKune v. Railroad*, 17 Am. & Eng. R. R. Cases, 389; *Phillips v. Railroad*, 23 Am. & Eng. R. R. Cases, 453; *Phillips v. Railroad*, 64 Wis. 475; *Washburn v. Railroad*, 3 Head (Tenn.) 638; *Sheehan v. Railroad*, 91 N. Y. 332. (4) Deceased being ignorant of the dangerous condition of the car, and it being in the dead hour of night, it was the duty of defendant to notify him of its situation and condition, in order that he might refuse to assume the risks of said danger; and its failure to do so was negligence. *Porter v. Railroad*, 60 Mo. 160; *Steahlendorf v. Rosenthal*, 30 Wis. 675; *Wedgwood v. Railroad*, 41 Wis. 478; 44 Wis. 44; *Bessex v. Railroad*, 45 Wis. 480; *Railroad v. Plunkett*, 25 Kan. 195; *Brown v. Railroad*, 15 Am. & Eng. R. R. Cases (Kan.) 275; *Porter v. Railroad*, 71 Mo. 72. (5) Deceased had a right to assume that defendant had left its sidetracks in a reasonably safe condition to work on, when it sent him in to do the coupling mentioned in evidence, on a dark night, and without warning. *Gibson v. Railroad*, 46 Mo. 169; *Lewis v. Railroad*, 59 Mo. 495; *Dale v. Railroad*, 63 Mo. 459; *Long v. Railroad*, 65 Mo. 229; *Parsons v. Railroad*, 94 Mo. 292;

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Railroad v. Plunkett, 2 Am. & Eng. R. R. Cases, 138; *Brown v. Railroad*, 15 Am. & Eng. R. R. Cases, 275; *Railroad v. Pinto*, 15 Am. & Eng. R. R. Cases (Texas) 286; *Haugh v. Railroad*, 31 Am. & Eng. R. R. Cases, 731, and cases cited; *Anderson v. Bennett*, 38 Am. & Eng. R. R. Cases (Ore.) 87; *Railroad v. Kier*, 38 Am. & Eng. R. R. Cases (Kan.) 122. (6) When it appears from the evidence that deceased, although negligent, would have suffered no injury had proper care and caution been observed by defendant, plaintiff is entitled to recover. The evidence in this case shows that Jackson could have ridden upon the brakebeam of the tender in safety, and could have coupled onto the boxcar, had it not been for the iron rails projecting over the end of said flat car. Jackson's conduct was not, therefore, the proximate cause of the injury. *Brown v. Railroad*, 50 Mo. 465, 468; *Bergman v. Railroad*, 88 Mo. 678; *Dunkman v. Railroad*, 95 Mo. 244; *Meyers v. Railroad*, 59 Mo. 227; *Railroad v. McCally*, 21 Pac. Rep. (Kan.) 574; *Railroad v. Kean*, 3 Cent. Rep. (Md.) 716. (7) Even if the deceased was improperly on the brakebeam of the tender, which is by no means conceded, yet he was there for the purpose of expediting the business of his principal, and not for the purpose of coupling cars from that position; his acts, therefore, had no connection with the cause of the injury, to-wit, the car being improperly loaded and left standing on the track where Jackson was required to perform his duty, without any warning of its dangerous condition, and in the dead hour of night. *Brown v. Railroad*, 50 Mo. 464; *Wagner v. Railroad*, 97 Mo. 523; *Pierce on Railroads*, 317. (8) If the evidence shows a state of facts from which different minds might fairly and honestly draw different conclusions as to what was the controlling or direct cause of the matter in controversy, it is a question to be submitted to the jury, although such facts are undisputed. *Clemens v. Railroad*, 53 Mo. 366; *Norton v. Ittner*, 56 Mo. 351;

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Lewis v. Railroad, 59 Mo. 495; *Dale v. Railroad*, 63 Mo. 460; *Stoddard v. Railroad*, 65 Mo. 515; *Kelley v. Railroad*, 70 Mo. 604; *Nagel v. Railroad*, 75 Mo. 653; *Loewer v. City*, 77 Mo. 431; *Flynn v. Railroad*, 78 Mo. 196; *Scoville v. Railroad*, 81 Mo. 434. (9) Where the evidence is undisputed, and fair-minded men of ordinary intelligence might honestly differ as to whether or not such facts show negligence upon the part of defendant, then it is peculiarly a question for the jury, and the court has no right to dispose of the matter as a proposition of law. *Kennayde v. Railroad*, 45 Mo. 255; *Huhn v. Railroad*, 92 Mo. 450; *Tabler v. Railroad*, 93 Mo. 85; *Chouteau v. Iron Works*, 94 Mo. 399; *Stephens v. Railroad*, 96 Mo. 212; *Wagner v. Railroad*, 97 Mo. 523; *Barry v. Railroad*, 98 Mo. 71; *Adams v. Railroad*, 100 Mo. 555. (10) The testimony of the brakemen of defendant, as experts, was properly rejected. *Gavish v. Railroad*, 49 Mo. 276; *Koons v. Railroad*, 65 Mo. 597; *Gutridge v. Railroad*, 94 Mo. 473; *Muldowney v. Railroad*, 36 Iowa, 472.

BLACK, J.—The plaintiff is the widow of Frank L. Jackson. She prosecutes this suit to recover damages for the death of her husband, who died from injuries received while in the employ of the defendant as a brakeman.

The evidence discloses the following facts: Jackson was an experienced brakeman in yards and on trains. He and his crew made their regular trips over the defendant's branch road from Pleasant Hill to Nevada, both points being in this state. On the occasion in question they left Pleasant Hill with their freight train about one o'clock and reached Harrisonville about two o'clock A. M. At that place the conductor of the train received orders from the train dispatcher to take into his train some cars which were standing on what is called the mill track, which was the third sidetrack south of the main track. The mill track was used for leaving

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thereon loaded cars, and also for storing empty cars. The record does not show what the duties of the train dispatcher were, but we infer he was simply a station agent at Harrisonville. The conductor gave the order, which he received from the train dispatcher, to his brakeman. Jackson uncoupled the engine and tender from the train then standing on the main track, got upon the engine, and under his directions the engine and tender moved forward to the switch which led to the mill track. He opened that switch, got upon the rear brake-beam of the tender, and directed the engineer to back in on that track. After passing some ten carlengths, he gave the engineer a signal with his lantern to back up. Jackson was then looking towards the engine. At that moment the tender struck a flat car loaded with iron rails. Some of the rails projected over the car from ten to eighteen or more inches, so that Jackson was caught between the ends of the rails and the tender, and received the injuries from which he died. The flat car stood between the tender and the cars which were to be placed in the train. The presence of the flat car was unknown to the conductor and to the engineer and to Jackson. It was a dark night, and it is evident Jackson did not see the flat car until the tender ran against it. The evidence does not show when nor how this car got on the track, nor does it appear that the train dispatcher knew that the rails projected over the car, or even that there was such a car on the track.

The plaintiff introduced the conductor as a witness, and the defendant read in evidence the depositions of the engineer and two brakemen, which depositions had been taken and filed in the case by the plaintiff. The evidence of these witnesses tends to show that the rails had shifted, that is to say, had slipped over the end of the car. Their evidence shows, beyond all doubt, that it was a daily occurrence to find iron rails and timbers projecting over the cars upon which they were loaded; that the defendant and other railroads always receive

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cars thus loaded; that cars loaded with projecting rails and timbers were coupled and uncoupled and placed in trains at the yards at Pleasant Hill where the deceased had been employed. The engineer says he found the iron extending over the flat car ten to fifteen inches, but does not know how it was loaded; that the engine struck the car hard enough to have slipped the iron that distance. After the accident the conductor and others placed one end of a timber against the engine tank and the other against the rails, and in that way pushed them back on the car.

There is an averment in the petition to the effect that Jackson got on the brakebeam of the tender by the order of the conductor; but the proof is clear that the conductor gave no such order. Jackson placed himself in that position of his own volition, and there is much evidence tending to show that this was a negligent act on his part, and that he should have walked ahead to see that the way was clear.

The first, and indeed the most important, question is, whether the plaintiff made out a *prima facie* case. If she did not, then the instruction in the nature of a demurrer to the evidence should have been given.

Counsel for the plaintiff, in an elaborate brief, have cited us to a vast number of cases relating to the duty of the master to furnish the servant with safe and suitable appliances, including tracks and cars; but we cannot see that these cases have any direct bearing upon the question involved in this case. The track was not out of repair, nor was the flat car deficient in any respect. The case must stand or fall upon the averment that the defendant was guilty of negligence in leaving this car, loaded as it was, upon the sidetrack, and on the further allegation that defendant ordered Jackson to go upon that track to get the desired cars without informing him of the flat car and the condition of the rails.

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The first question then is, was the defendant guilty of negligence in leaving this car, loaded as it was, upon the sidetrack. The law is well settled that the servant assumes those risks which are incident to the business which he undertakes to perform. For injuries arising from ordinary risks attending the particular business, the master is not liable. The ordinary risks of a particular business are those which are part of the natural and ordinary method of conducting that business, although they may fairly be called extraordinary, with reference to a different business. 1 Shear. and Red. on Neg. [4 Ed.] sec. 185.

Now the proof in this case is all to the effect that cars were daily taken into trains, loaded with building and other timbers and with railroad iron, so that the timbers and rails project over the cars. Indeed, this is but a matter of common observation. It is also shown that rails and timbers loaded upon cars will slip back and forth. The business of a brakeman is beset with many dangers which are incident to his business, and these risks arising from cars loaded with projecting timbers and rails are risks incident to this particular business, and as to that business are not extraordinary. It must, therefore, follow that the defendant was not guilty of any negligence either in hauling this car loaded with railroad iron, or in allowing it to stand upon its sidetrack. We think this conclusion is supported by good authority as well as by reason.

In *Northern Central Ry. Co. v. Husson*, 101 Pa. St. 1; 12 Am. & Eng. R. R. Cases, 244, a servant of the defendant company, while engaged in coupling cars on a work train, was killed by having his head caught between the ends of bridge irons which projected beyond the ends of the cars on which they were loaded. The regulations of the company, known to deceased, required persons in coupling such cars to stoop and couple from beneath by reaching up. The mode of loading the cars adopted in that case was usual on that

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road. It was held there was no evidence that the risk run by deceased was an extraordinary one.

A head note to the case of *A., T. & S. F. Ry. Co. v. Plunkett*, 25 Kansas, 188, which was prepared by the judge writing the opinion, as we are informed, is in these words: "Where a railroad company is in the habit of receiving other railroad cars, loaded with timbers which project over the ends of the cars, so as to make it dangerous for anyone except a careful, skilful and prudent person to attempt to couple the cars together, it is not negligent for the railroad company to order and permit such a person, who has been in the employ of the railroad company doing that kind of business for about five months, to attempt to make such a coupling, where the attempt is to be made in broad daylight, although it may be raining at the time." See, also, *Scott v. O., R. & N. Co.*, 14 Oregon, 211, and *Day v. Railroad*, 42 Mich. 523. These cases, we think, support the conclusion which we have before stated, namely, that, where a railroad company is in the habit of receiving and transporting cars loaded with timbers and iron rails which project over the cars upon which they are loaded, the risks arising from such projecting timbers or rails is nothing more than an ordinary risk assumed by the brakeman.

But it is insisted that the train dispatcher and Jackson were not fellow servants, and that the train dispatcher was a vice-principal under the ruling of this court in *Smith v. Railroad*, 92 Mo. 359, and that the act of this man in ordering Jackson to go on the mill track, without informing him of the dangerous condition of the rails on the flat car, was the act of the defendant. This line of argument would at first seem to be well founded. But it has but little merit when we come to look into the facts as disclosed by the record.

In the first place it does not appear what the duties of this so-called train dispatcher were. So far as we can see he was nothing more than a station agent. It nowhere

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appears that it was his duty to examine the cars left on the sidetrack, nor does it appear that he knew this flat car was on the track, much less that it was loaded with projecting rails. The evidence shows that he informed the conductor of the freight train of the fact that there were certain cars on the mill track to be taken out and placed in the train. The numbers of the cars were given to the brakemen, and they set about the work of getting them out in their own way, and according to their own judgment. The deceased was bound to know that this mill track was used for storing such cars, loaded and unloaded, as defendant was in the habit of using on its road. There is no evidence showing, or tending to show, that the train dispatcher or the conductor or anyone else said or intimated that the cars to be taken out were the only cars, or the first cars, on the sidetrack. In this state of the case it was the duty of deceased to look out and see that the way was clear, and we cannot see that this unfortunate accident was due to anything more than the want of care on the part of the deceased.

The judgment in favor of the plaintiff is, therefore, simply reversed. BARCLAY, J., dissents the other judges concur.

THE STATE *ex rel.* HUGHLETT V. HUGHES, *Judge, et al.*

DIVISION ONE.

1. **Constitution : TITLE OF ACT : ADDITIONAL TERMS OF COURT.** The act of the legislature of April 11, 1889 (Laws, p. 68), entitled "An act to repeal section 1147, of article 4, chapter 23, of the Revised Statutes of Missouri, entitled 'circuit courts,' and to enact a new section to be numbered 1147 in lieu thereof, providing for the times and places of holding circuit courts in Audrain, Pike, Lincoln and Montgomery counties," provided for two additional terms of the

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circuit court to be held at Montgomery City, in Montgomery county, and which is not the county seat of said county, and also required the judge and clerk of the court to make the necessary preparations therefor. *Held* that the act is not in conflict with article 4, section 28, of the constitution, providing that no bill shall contain more than one subject which shall be clearly expressed in its title.

2. ——— : SPECIAL OR LOCAL LAW. Said act is not a special or local law, and, therefore does not fall within the provisions of article 4, section 54 of the constitution providing that, "no local or special law shall be passed until notice of the intention to apply therefor shall have been published in the locality."
3. ——— : REMOVAL OF COUNTY SEAT. Nor is said act in conflict with article 9, section 2, of the constitution providing, that "the general assembly shall have no power to remove the county seat of any county."
4. **Injunction : CONSTITUTIONALITY OF LAW.** An injunction in the name of the state on the relation of the prosecuting attorney against the circuit judge, the clerk and the sheriff, was a proper proceeding by which to test the constitutionality of the act.

Appeal from Montgomery Circuit Court.—HON.
ALEXANDER MARTIN, Special Judge.

AFFIRMED.

Warner Lewis for relator.

(1) The remedy by writ of injunction shall exist in all cases to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages. R. S. Mo. 1879, sec. 2722, p. 457. And so the inquiry is, can an adequate remedy be afforded in an action for damages, if the acts sought to be restrained are permitted to be done, and the injunction refused? "One of the offices of an injunction is to prevent a multiplicity of suits where the whole question can be decided in one and the same proceeding. *Damschroeder v. Thias*, 51 Mo. 100; *Valle v. Zeigler*, 84 Mo. 214; *Book v. Earl*, 87 Mo. 246; Cooley on Taxation [2 Ed.] 763; *Mathias v. Cameron*, 62 Mo. 504; *State v. Saline Co.*, 51 Mo. 350; *Newmeyer v. Railroad*, 52 Mo. 81. And thus we see

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the object of an injunction is preventive rather than restorative. See Snell's Princ. of Eq. [Am. Ed.] 481; *Overall v. Ruenzi*, 67 Mo. 203. (2) It has been uniformly held that a law is construed to be local or special, when by its application it relates to particular things or persons or a particular portion of a state, as for instance a county. Sedgwick on Const. Const'r [2 Ed.] note p. 629; *Earle v. Board*, 55 Cal. 489; *People v. Supervisors*, 43 N. Y. 10; *State ex rel. v. Judges*, 21 Ohio St. 11; *State ex rel. v. Hermann*, 75 Mo. 340; *State v. Toole*, 71 Mo. 645; *State ex rel. v. Pond*, 93 Mo. 640; *State v. Kring*, 74 Mo. 622; *State v. Philbrick*, 15 N. J. 579; *State v. Commissioners*, 14 N. J. 587; *Clark v. City*, 14 N. J. 581; *Frost v. Cherry*, Pa. A. 782; *City v. Savage*, 13 Pa. 919. The subject of the amendment was to establish courts at another place in Montgomery county, and there is nothing in the title indicating that purpose. The act is, therefore, obnoxious to section 28, article 4, of the constitution. *Ewing v. Hoblitzelle*, 85 Mo. 64; *State v. Miller*, 45 Mo. 497.

D. H. McIntyre also for relator.

(1) The act complained of is local, for the reason that it affects the people and the property of one county only, and does not, either in its subject or operation, relate to the people of the state or their property in general. Sedgwick on Stat. and Const. [2 Ed.] note on p. 529; *Earle v. Board*, 55 Cal. 489; *People v. Supervisors*, 43 N. Y. 10; *State ex rel. v. Judges*, 21 Ohio St. 1; *State ex rel. v. Hermann*, 75 Mo. 340. (2) An act which affects and has its operation in one or two counties only is local. *Earle v. Board*, 55 Cal. 489; *State ex rel. v. Judges*, 21 Ohio St. 1; *People v. Supervisors*, 43 N. Y. 10; *State ex rel. v. Hermann*, 75 Mo. 340; *State ex rel. v. Walton*, 69 Mo. 556. (3) Though the act in question may be a general law in form, yet it is local in its operation and

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effect, and courts of justice cannot permit constitutional prohibitions to be evaded by dressing up special laws in the garb and guise of general statutes. *State ex rel. v. Hermann*, 75 Mo. 340; *Earle v. Board*, 55 Cal. 489; *State ex rel. v. Judges*, 21 Ohio St. 1. (4) Whether an act is local and special, or general, must be determined by its operation and effect, and not by its form. *State ex rel. v. Judges*, 21 Ohio St. 1; *State ex rel. v. Hermann*, 87 Mo. 340; *Earle v. Board*, 55 Cal. 489. (5) The act complained of, having no operation or effect except in Montgomery county, is clearly a local act, and should have been passed as such, and notice of the intention to apply to the legislature for the passage of such act should have been exhibited in the legislature, and the substance of such notice should have been recited in the bill. Const. 1875, sec. 54, art. 4; R. S. 1879, *et seq.*, sec. 6255, ch. 124. A law which applies only to a limited part of the state (as a county) and the inhabitants of that part is local. 2 Abbt. Law Dic., p. 56. (6) The provisions in the act complained of, fixing the times and places for holding the circuit court throughout the district, are in each of the counties precisely the same as those of the act of March 19, 1887, and these provisions, with reference to Audrain, Lincoln and Pike counties in the act complained of, are verbatim copies of said act of March 19, 1887, with the exception that the term Monday is used in the plural in the counties of Montgomery and Pike in the said act of 1887. Hence it follows these provisions being the same as the prior laws existing at the commencement of the revising session are continuations of existing laws, and not new enactments. Act of March 19, 1887, p. 147; Act of April 11, 1889, p. 68; Act declaratory of Revised Statutes, approved May 15, 1889, p. 146; *City v. Alexander*, 23 Mo. 509; *State ex rel. v. Heidorn*, 74 Mo. 410. The act complained of is violative of section 28, article 4, constitution, 1875, for the reason that the subject of the act is not clearly set forth in the title, nor

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is it set forth at all. The requirements of this section are mandatory. *Ewing v. Hoblitzelle*, 85 Mo. 64; *State v. Miller*, 45 Mo. 495; *Cannon v. Hemphill*, 7 Tex. 184; Cooley's Con. Lim. [5 Ed.] pp. 93, 94. The title should not mislead nor tend to avert inquiry into the contents of the act. *Holmes Case*, 77 Pa. St. 77. The title must be a fair index of the subject-matter of the bill. *State ex rel. v. Miller*, 100 Mo. 439. (7) This act is contrary to the precedents established by the legislature in passing acts on the same subject. Acts, 1877, p. 222; Acts, 1877, p. 215; Acts, 1879, p. 84; Acts, 1887, p. 141; Acts, 1889, p. 86. (8) Injunction is the proper remedy, and the only remedy that can be resorted to. The acts sought to be restrained are ministerial in their nature, and are wholly unauthorized by law. Such acts are, therefore, legal wrongs within the meaning of the statutes. R. S. 1889, sec. 5510; *State ex rel. v. Court*, 51 Mo. 350; *Mathias v. Cameron*, 62 Mo. 504; *Railroad v. Apperson*, 97 Mo. 300; *Bank v. Kercheval*, 65 Mo. 682. Jurisdiction of equity to restrain public officers by suit at the relation of the prosecuting attorney or the people in violation of law to the prejudice of the public is well established. High on Injunction [2 Ed.] sec. 1327; *People v. Board*, 55 N. Y. 390. The state, through its proper officers, may restrain the enforcement or execution of unconstitutional acts. 2 High on Injunctions, secs. 1282, 1304. Injunction will issue to prevent the invasion of legal rights without the proof of great damages or proof of any damages. *Railroad v. Railroad*, 69 Mo. 65; *Com. v. Railroad*, 24 Pa. St. 160; *Bank v. Kercheval*, 65 Mo. 682; *Harris v. Board*, 22 Mo. App. 462.

G. Pitman Smith for respondents.

(1) Relator has not the capacity to bring this action, it not being against any public corporation or municipality. *State ex rel. v. Court*, 51 Mo. 350; *Ewing v. Board*, 72 Mo. 436. (2) Relator has mistaken his

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remedy. The question should be raised in the court itself, when pretending to act by some party about to be subjected to its process or jurisdiction. *Vitt v. Owens*, 42 Mo. 512; *City v. Wright*, 69 Ill. 318; *Ewing v. Board*, 72 Mo. 440; *State v. Johnson*, 4 Wall. 475. (3) The bill should be dismissed for want of equity, and, lacking this, the court will not proceed to declare an act unconstitutional upon some abstract proposition, or mere theory framed for the occasion. *People v. Board*, 55 N. Y. 395; *Deckhaus v. Ordeltoid*, 22 Mo. App. 76. (4) Injunction would be useless, as the action of the court now would not result in anything but an empty decree; because, at the time of trial below, all the things from the doing of which relator fears injury had been done, and rooms and offices provided for all time to come free of cost to the county. (5) The general judiciary law of the state now provides that circuit court shall be held at certain times and places in Montgomery county. R. S. 1889, sec. 3365. (6) Whenever a power is given by statute, everything necessary to making it effectual is given by implication. *Sheidley v. Lynch*, 95 Mo. 492; *Boone Co. v. Todd*, 3 Mo. 140; *Ex parte Kiburg*, 10 Mo. App. 422; *Harper v. Jacobs*, 51 Mo. 296; 71 Mo. 454. (7) Rejecting the provisions of this act for carrying out its chief intent, the general law on the subject, without resorting to implication, authorized all the acts threatened by the defendant. R. S. 1879, secs. 1104, 623, 625, 628, 1024, 3887; Acts, 1885, p. 107; *Whallon v. Ingham*, 51 Mich. 504. (8) Every presumption will be indulged in favor of the validity of an act of the legislature, and courts will not declare it unconstitutional except in a very clear case. Cooley's Con. Lim. [3 Ed.] 181-3; *State v. Laughlin*, 75 Mo. 150; *State v. Pond*, 93 Mo. 606; *Hamilton v. St. Louis Co.*, 15 Mo. 3; *Phillips v. Railroad*, 86 Mo. 540; *The State to use v. Aubuchon*, 8 Mo. App. 328; *Ogden v. Saunders*, 12 Wheat. 270. (9) If a statute attempts to accomplish two or more objects,

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and is void as to one, it will still be held valid as to the others, if they can be separated. *Cooley's Con. Lim.* 177, 178; *Allen v. Louisiana*, 103 U. S. 83; *City v. Railroad*, 14 Mo. App. 225; *State v. Williams*, 77 Mo. 313; *Ensworth v. Curd*, 68 Mo. 283. (10) Matters germane to the general subject expressed in the title to an act are properly united in the provisions of the bill. *Ensworth v. Curd*, 68 Mo. 285; *State ex rel. v. Wood*, 71 Mo. 266; *Bergman v. Railroad*, 88 Mo. 678; *Ewing v. Hoblitzelle*, 85 Mo. 64. (11) The subject of the bill is clearly expressed in the title. It is sufficient if the general subject-matter is fairly embraced. Mere matters of detail need not be stated in the title; but these are mere incidents to the general objects of the act, and do not make it a local law. *State ex rel. v. Miller*, 100 Mo. 445. (12) The constitution contemplates the holding of sessions of the circuit court at different "places in each county" and expressly authorizes the law-making power to fix those "places." Const., art. 6, sec. 22. (13) The circuit court is the "judicial power of the state;" and embodied in the person of the state's officer, called the circuit judge, is by organic law commanded to enter each county at least twice a year to exercise its functions. Const., art. 6, sec. 22. (14) This judicial power, as lodged in the various courts established by the constitution, constitutes one of the three co-ordinate branches of the state or sovereignty, and all legislation relating thereto is necessarily general, because it relates to the power and operations of the great sovereignty itself. Const., art. 3; *State ex rel. v. Shields*, 14 Mo. App. 259. (15) No law can be local or special within the meaning of the constitution, which results directly from a specific constitutional power. *State ex rel. v. Shields*, 4 Mo. App. 259; *State ex rel. v. Walton*, 69 Mo. 558; *Ewing v. Hoblitzelle*, 85 Mo. 75. (16) The people of a county have nothing to say as to when or where the state shall hold its courts, or how

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they shall be conducted; but the legislative branch of the government has full control of the whole matter, subject only to the one express limitation of the constitution, that "at least two terms shall be held every year in each county." Const., art. 6, sec. 22; 51 Mich. 504. (17) The county seat has no connection with the circuit court, except by association, and the constitution nowhere intimates that any session of the circuit court must be held there. Const.; 51 Mich. 513-14. (18) The effect of the act is to establish Montgomery City as a place for holding a session of the circuit court of the state, not to establish a new court. *Trimble v. State*, 2 Greene (Iowa) 404; 51 Mich. 504.

BRACE, J.—The Thirty fifth General Assembly passed an act approved April 11, 1889, entitled "An act to repeal section numbered 1147 of article 4, chapter 23, of the Revised Statutes of Missouri, entitled 'Circuit courts,' and to enact a new section to be numbered 1147 in lieu thereof providing for the times and places of holding circuit courts in Audrain, Pike, Lincoln and Montgomery counties." Sess. Acts, 1889, p. 68.

By article 3 of the constitution of this state, the powers of government are divided into three distinct departments: The legislative, executive and judicial. By article 6, section 1, the judicial power is vested in the circuit and other courts therein specified. By section 22 of said article, original jurisdiction both civil and criminal in all cases, not otherwise provided for by law, is vested in the circuit court, and concurrent jurisdiction with, and appellate jurisdiction from, inferior tribunals as may be provided by law, and, by section 23 of the same article, a superintending control over all inferior tribunals is given to the circuit court.

By section 22, it is further provided, that "It shall hold its terms at such times and places in each county as may be by law directed, but at least two terms shall be held every year in each county." Section 24 requires

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the division of the state into convenient circuits and the election of a judge in each circuit.

Article 4, chapter 23, of the Revised Statutes of 1879, is the general law enacted for the purpose of putting in operation the foregoing constitutional provisions, by providing for the election of circuit judges, the division of the state into judicial circuits, and appointing the times and places when and where terms of the circuit court shall be held in each judicial circuit.

Section 1147 of that article appoints the times and places for holding circuit courts in the third judicial circuit composed of the counties of Audrain, Pike, Lincoln and Montgomery. By this section but two terms of the circuit court were required to be held in Montgomery county. By the act of April 11, 1889, no change in the terms of the court to be held in either of the other counties of the circuit is made, but the act requires that four terms of the circuit court be held in Montgomery county: Two at Danville, the county seat, and two at Montgomery City in said county. The defendants are the judge of the third judicial circuit and the clerk and sheriff of Montgomery county. The terms of the circuit court in said county having always hitherto been held at the county seat, it was necessary that a proper house should be selected, and conveniences prepared for the transaction of business at Montgomery City. The act authorized said officers, to make these preparations, and contains other provisions incident to the holding of two more terms of the circuit court at a place other than the county seat, in said county. The defendants were proceeding to perform the preparatory acts enjoined upon them by this act, when this proceeding by injunction was instituted. Hon. ALEX. MARTIN was selected as special judge; a temporary injunction was refused. Upon final hearing the bill was dismissed, and the relator appeals.

The relator maintains that the defendants ought to be restrained from performing the ministerial acts

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required of them by said amendatory act, and essential to carry into effect its provisions for holding two terms of the circuit court at Montgomery City, on the ground that the act is unconstitutional. The provisions of the constitution to which he claims it is obnoxious are section 28, article 4: "No bill (except general appropriation bills * * *) shall contain more than one subject which shall be clearly expressed in its title."

Section 54, article 4: "No local or special law shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated * * *."

Section 2, article 9: "The general assembly shall have no power to remove the county seat of any county * * *."

I. As the judicial circuits of the state are generally composed of several counties, all presided over by one judge, in order that there may be no conflict of terms, it is necessary that the time of holding terms of court in each county shall be arranged with reference to the terms to be held in the other counties of the same circuit.

The subject of appointing the terms of the circuit court for the several counties composing a single circuit is, therefore, a single subject, and it has always been the practice of the legislature to provide in a single and separate section for the holding of such terms in all the counties of any one circuit. It is so provided in the act under consideration, and the act is not objectionable on that account. By the constitution the legislature, as we have seen, is invested with power by law to fix the times and places of holding terms of the circuit court in each county; it is not restricted to one, or any number of places, or to any particular place in a county, and the fact that two places are provided in one act, in which terms of the circuit court in any county are to be held, does not destroy the unity of the subject of the act, providing for holding terms of the circuit court in

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such county, and if in one of the places designated terms of the circuit court had not theretofore been held and necessary preparatory acts should be required to be done, whereby terms thereafter could be held at such place, such requirement, being simply a provision of the means necessary to the accomplishment of the main purpose of the act, is incident and germane to the subject thereof, and might well be embraced therein. *State ex rel. v. Miller*, 100 Mo. 439; *Bergman v. Railroad*, 88 Mo. 678; *Ewing v. Hoblitzelle*, 85 Mo. 64.

The act in question cannot be said to embrace more than one subject, whose title is clearly expressed in the words, "An act providing for the times and places of holding circuit courts in Montgomery county."

II. Much stress is laid upon the second constitutional objection, and it is strenuously contended that the act in question is a local and special law. We have examined the many authorities cited by counsel in their brief, but find nothing therein to support this contention. And it does seem that the provisions of the constitution hereinbefore cited ought to be a sufficient answer to this objection. By it the circuit court is invested with much the largest share of the power of one of the grand departments of the state government, the judicial department. It is the only court of general original jurisdiction in both civil and criminal cases in the state. The due administration of the laws of the state is more largely dependent upon the prompt, proper and efficient exercise of its power, than upon all other governmental agencies. Every citizen of the state is interested in such an administration, not only in the particular locality in which he may happen to reside, but in every nook and corner of the state; for he cannot tell in what hour he may need the protection of those laws administered by this tribunal, nor in what part of the state.

The constitution undertakes to guarantee to all its citizens that, at least twice in every year, its power by

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this tribunal shall enter the borders of every county in the state for the protection of life, liberty and property, whether the citizens of the county so desire or not, and oftener, if, in the judgment of the legislature, it be necessary or expedient; and that its terms shall be held at such times and places as the legislature may choose to designate. The time when and place where in any county the circuit court shall be held is, by the constitution, given directly in charge to the legislature; its judges are commissioned and paid by the state. It is pre-eminently a state court, affecting in its operations all the citizens of the state, deriving its powers directly from the organic law of the state and laws passed by the legislature in pursuance thereof, and, whenever and wherever held, it is the circuit court of the state of Missouri within and for the county in which it is held; it is not, and in no sense can be, a local court, nor can any law the legislature may pass regulating the time and place of holding its terms be a local law. The fact that for convenience the state is divided into judicial circuits, and a judge elected for each circuit, who is required to hold terms in each county of his circuit, does not disintegrate the court, or localize it, but simply provides convenient channels through which the power of the state vested in this tribunal may freely flow to all parts of the state for the beneficent purposes for which it was placed in such tribunal.

“No law can be either special or local, within the meaning of the constitution, which results directly or indirectly from a specific constitutional requirement.” *Ewing v. Hoblitzelle*, *supra*; *State ex rel. v. Shields*, 4 Mo. App. 259; *Whallon v. Ingham*, 51 Mich. 503. Nor can the efficient operation of the functions of a department of the state government be in any manner subject to the control, or dependent upon the action, of the citizens of any particular locality in the state. In the nature of things, the act in question is not, and cannot be, a special or local law.

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III. From what has been said, it is apparent that the legislature has the power to provide for holding terms of the circuit court at more than one place in a county. Where no such provision is made, and no place is named, the immemorial custom has been to hold such term at the county seat. But the holding of the circuit court there does not make it the county seat, and such custom cannot limit the express power, given by the constitution, to provide for holding terms of the circuit court at a place other than the county seat, and when such other place is appointed, while it becomes a seat of justice in said county, it does not become a county seat. The county seat is where the business of the county is transacted, where local tribunals sit for the transaction of local and county business, and where county officers have their offices. The act in question, even if it did not provide for holding terms of the circuit court at the county seat, would not have the effect, directly or indirectly, of removing the county seat; in point of fact, however, under its provisions, the same number of terms of the circuit court are to be held at the county seat as before, and there is nothing in the act obnoxious to the third constitutional objection.

IV. While it is, perhaps, unnecessary to pass upon the question, it would seem there can be little doubt that injunction is the proper remedy for the relief sought in this action, and that the action was properly brought on the relation of the prosecuting attorney. R. S. 1889, sec. 5510; 2 High on Injunction, sec. 1327; *State ex rel. v. Court*, 51 Mo. 350. The judgment of the circuit court is affirmed. All concur.

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FULKERSON *et al.*, *Appellants*, v. SAPPINGTON *et al.*

DIVISION TWO.

1. **Fraudulent Conveyance: EVIDENCE.** In a suit to set aside a conveyance of land because made in fraud of creditors, it appeared that defendant, who was county treasurer, purchased the land for \$2,100 and paid for it with the public funds, but took the title in the name of a third person; that after two years, at his request, the land was conveyed to one M., who likewise held it in secret trust, having paid nothing for it; that the debtor afterwards resigned his position as county treasurer, being a defaulter to the extent of \$6,000, and hopelessly insolvent; that among his debts was a note for \$3,000 to his bankers, one of whom was M.; that his surety thereon was desirous of being released; that the defendant persuaded his brother to become his surety, and to indemnify him obtained an agreement from M. to convey the land to him upon the payment of the note, and reciting that the price of the same at \$1,500 was included therein; that defendant to further indemnify his brother executed a mortgage on his homestead; that his brother was sheriff of the county and had heard rumors of defendant's condition, but made no inquiry; that he examined the title and thought he would be safe. The plaintiffs claim under one who bought the land at execution sale under a judgment in favor of the county against defendant and his bondsmen. *Held*, reversing the decree of the trial court, that the conveyance to defendant's brother was made in fraud of creditors, and that the title to the property should be divested out of respondents and vested in the appellants.
2. **Practice in Supreme Court: REVIEWING FINDING IN EQUITY CASE.** Where the finding of the trial court in an equity case is clearly erroneous, the supreme court will not defer to it.

Appeal from Saline Circuit Court.—HON. RICHARD
FIELD, Judge.

AFFIRMED.

THIS is a suit in equity by appellants against respondents, to obtain a decree of title to a tract of about ten acres of land near Marshall, in Saline county, Missouri. The plaintiffs are purchasers of the title of

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Barnabas Sappington under execution, against defendant, Frank Sappington, who claims by virtue of certain conveyances charged by plaintiffs to be fraudulent as against them.

From 1868 to 1874, Barnabas Sappington was the treasurer of Saline county, Missouri. Among others, Frederick Fulkerson was one of his bondsmen. The appellants are the heirs at law of Frederick Fulkerson. Frank Sappington is a brother of Barnabas Sappington, and was sheriff of Saline county in 1873 and 1874. In 1871, Barnabas Sappington purchased of John W. Bryant the ten-acre tract of land in controversy in this case and another tract of nine and one-half acres adjoining it. He paid for the lands by check for \$2,100 on Cordell & Montague, bankers in Marshall, with whom he kept his account as county treasurer. The evidence clearly shows that he had no money in said bank at the time other than county funds. He caused the title to the land in suit to be conveyed by Bryant to one James H. Eakin in September, 1871. Eakin held the title, in secret trust for Barnabas, until February, 1873, when, at the request of Barnabas, he conveyed it to E. D. Montague, one of the firm of Cordell & Montague.

In the fall of 1873, it was discovered that Barnabas Sappington was a defaulter in his office of treasurer. It seems to have become generally known, as he says, he resigned because he was behind in his accounts and could not make up the amount of his shortage, and the *people wanted a new treasurer*. He tendered his resignation on the twenty-third day of December, 1873. David Landen was appointed his successor, and the settlement of Barnabas set for hearing in January, 1874. On this final settlement it appeared he owed the county nearly \$6,000.

On December 10, 1873, Montague and wife executed to Frank Sappington the following contract for a deed to the lands in suit :

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"Know all men by these presents, that I, E. D. Montague, of the county of Saline, state of Missouri, have this day sold to F. M. Sappington the following described real estate situated in Saline county, Missouri, to-wit: The east half of the southwest quarter of the southeast quarter of section 11, township 50, of range 21, to which said land I agree and bind myself to make a deed with covenants of special warranty, conveying said land to F. M. Sappington, or to whom he may direct, on the following condition, to-wit: That B. Sappington and F. M. Sappington have this day executed to Cordell & Montague their joint note for the sum of \$3,000, dated December 10, 1873, due January 1, 1876, bearing ten-per-cent. per annum interest from date, which said note embraces the consideration for said land, to-wit, \$1,500. Now, if said note shall be paid when due then this obligation to be in full force; otherwise to be void. Witness my hand and seal this tenth day of December, 1873.

"[Seal.]

E. D. MONTAGUE,

"[Seal.]

MARY N. MONTAGUE."

Which was acknowledged on the twelfth and recorded on the thirteenth of December, 1873.

Afterwards on the sixth of March, 1879, Montague and wife made a "special warranty" deed to Frank Sappington to the said lands, and it was recorded in recorder's office in Saline county, March 7, 1879. It is this contract and deed that plaintiffs charge are fraudulent, and seek to have them declared void.

The petition in this case was filed March 17, 1887, and charges that Barnabas was county treasurer; that Frederick Fulkerson and others were his bondsmen; that he defaulted and became and was wholly insolvent; that he was indebted to the county in the sum of \$6,000 in the fall of 1873; that being so indebted said Barnabas and Frank Sappington and E. D. Montague entered into a fraudulent combination and arrangement,

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whereby the land in suit was to be conveyed to Frank Sappington by Montague upon the payment of a certain \$3,000 note that day executed to Cordell & Montague by Barney and Frank Sappington.

The petition also sets forth, that at the same time Barney secured Frank against loss as security on said note, by a deed of trust on his other place of nine and one-half acres. The petition charges this contract and subsequent deed to have been voluntary and fraudulent; made to defeat the creditors of Barney, especially Saline county. Charges that judgments were obtained on his defaults to the county; the sale of this land under said judgments and the purchase by Frederick M. Fulkerson, the ancestor of plaintiffs; that at the time of the execution of the contract the lands were vacant and unimproved. The prayer is for cancellation of deed of Frank Sappington and decree of title in the plaintiffs.

The answer admits the relations of the parties; that Barney was treasurer and that Frederick Fulkerson was surety on his bond; that he was indebted as charged in petition. Denied all fraud. Set up the purchase of Bryant, the execution of the deed to Eakin, the payment of the money by Barney, and then states that Barney sold and at his request Eakin conveyed the land to Montague; that afterwards Barnabas Sappington in November, 1873, became indebted to Cordell & Montague in the sum of \$3,000, with Isaac Elzea as his surety; that Elzea insisted on being released; and the *said Montague was not able to pay the same*, and, for the purpose of securing Cordell & Montague and releasing Elzea, Barnabas executed a new note for \$3,000, with Frank as surety; and that at this time Frank bought the land in question from Montague and it was agreed between Frank and Barney and Montague that Frank should pay \$1,500 on the note and that Barney should release Montague from the payment to him of that amount for the land, and that upon the

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payment of the \$3,000 in full Montague should make Frank a deed for the land; that Frank had paid the note and Montague on March 6, 1879, made him the deed and pleaded the statute of limitations.

Plaintiffs to the statute of limitations replied an estoppel.

Barnabas Sappington, one of the defendants, testified that he bought the land in question from John W. Bryant, in September, 1871, together with the northwest quarter of the southwest quarter of the southeast quarter of the same section, through Eakin as his agent; and it was conveyed by Bryant to Eakin, and the title remained so in Eakin until February 12, 1873, in trust for him, Barney Sappington, without any evidence, from Eakin to said Sappington, of the payment of the purchase money by said Sappington or of the trust in Eakin; that the land was paid for by the witness, Barney Sappington, at that time with money which belonged to Saline county and was in his custody as treasurer of said county, by means of a check, for \$2,100 drawn by him, about the thirtieth of September, 1871, on the banking house of Cordell & Montague at Marshall, Missouri, where he had a large amount of county money deposited to his individual credit, which check was paid, by the bank, on the tenth of October, 1871, out of the county money so to his, Barney Sappington, credit, and charged to his account; that he had no other money or credit in the bank at the time, and that the money so paid for the land has never been paid back or made good to the county, by him; but was afterward paid by the sureties on his official bonds as treasurer on judgments recovered against them at the suit of the county.

That he bought the land from Bryant, through Eakin, and took the deed in Eakin's name, because he thought he could buy it cheaper in that way; that Eakin so held the title from September 30, 1871, till

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February 12, 1873, when he, at the request of the witness, conveyed it to Montague; that, prior to becoming treasurer, he was engaged in mercantile business, in Marshall, in partnership with his brother, Frank M. Sappington; that just before he became treasurer they closed out their business and exchanged their stock of goods for a tract of land on Blackwater; that his, Barney, entire interest in the stock and business, went into the land, in which he, thereby, acquired a one-third interest, which was afterwards sold under executions issued on the judgments recovered by Saline county, against him and his sureties on his official bond as treasurer; that he had no other property except the nine and one-half acres on which he lived and one-third interest in two lots in Marshall for about \$400; which were sold under the same execution; that, after he became treasurer, he had no other income, or means of support, except his salary as treasurer; which he thought may have been as much as \$700 per year, not more; that he had a family to support, and his expenses were quite equal to his salary.

That he deposited the county funds in Cordell & Montague's bank in his own name, to his individual credit, not as treasurer; and never had an account there otherwise; that he paid for the land in question by his check for \$2,100 on Cordell & Montague's bank, drawn against his account with the bank; and it was paid by the bank and charged to his account; that he did not know that he had any money to his credit in the bank, at the time, except that of the county; and supposed that he never had refunded or made good the money paid on that check to the county, and that it formed a part of his final deficit, at the time of his resignation; that Eakin had conveyed the land to Montague at his instance and request (which is also alleged in the answer); that the reason he had it conveyed, by Eakin to Montague, was, that Montague had promised that he would take a part of the land, when he, Sappington, bought it.

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That he resigned because he was behind in his accounts, and could not make up the amount of his shortage, and the people wanted a new treasurer.

That there was no writing, or other evidence between him and Montague of any understanding, or of their respective rights in the premises; that his and Frank's joint note of \$3,000 was given to Cordell & Montague in lieu of his note to the bank for \$3,000, on which I. N. Elzea was security; that he got his brother Frank to go on the note to release Elzea, and (referring to his testimony in the bill of exceptions shown him) that he supposed it was his testimony in that case, and that it was true, as stated in the bill of exceptions, that when his funds were counted in Cordell & Montague's bank, in 1873, he borrowed a sum of money from the bank to make up his shortage, and returned it to the bank, immediately after the counting; that the contract for a deed from Montague to Frank Sappington, and the deed of trust to Will H. Wood as trustee for Frank Sappington, were executed at Cordell & Montague's bank.

Frank Sappington testified to the same facts as Barney, with regard to their partnership, and the exchange of their stock for the land on Blackwater, etc., and also testified: That he learned of the purchase of the land in question by his brother Barney at the time it occurred; that, at the time the arrangement was entered into between him and Montague and Barney, he heard rumors of Barney's condition; that before he entered into that arrangement, he examined the records as to the title of the land in question, to ascertain whether he would be safe in entering into the arrangement, and found, as he supposed, that he would; that he did not make further inquiry, to inform himself when he heard the rumors about Barney's condition, because he thought it was none of his business, and he thought it was a delicate matter to be inquiring about another man's financial condition; that, when he found

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that he would be safe, it was all that concerned him, and he did not care to inquire further; that, during the time to which the evidence relates, he, Frank Sappington, was the acting sheriff of Saline county, and in attendance on the courts as such; and that the papers in the suits of Saline county against Barney Sappington and his sureties on his official bonds as treasurer came into his hands for service, and were served by his deputy, as shown by the returns on them; that Barney, his brother, came to him to go on the note to the bank to release Elzea, and, after he had examined the records to see that he would be safe, he consented to do so; that the contract for a deed, from Montague to himself, and the deed of trust were executed at the bank of Cordell & Montague; that he was not present when it was done; and did not know that they were delivered to him before they were recorded; that Barney may have had them recorded and delivered them to him afterwards; that he made the payment on the note at the time indicated by the indorsement on it; that during the time from 1868 to 1874 he and Barney both lived in Marshall and often met; that he had knowledge of the pendency of the suits against Barney Sappington and his sureties when they were going on; that in the arrangement \$1,500 was understood to be the price of the land; that he and his brother Barney both lived in Marshall and met frequently, during all the time to which the evidence relates; that he did not talk with Barney about his affairs; but he heard at the time of his resignation, that he was a defaulter to the county. And that on a recent sale of the other property conveyed in the deed of trust by which he was secured (Barney's homestead to Leverett Leonard) he, the witness, had reserved all of the amount paid by him on the note to the bank, over and above the \$1,500 consideration, for the land in controversy.

E. D. Montague testified: That he may have told Sappington he would likely take a part of the land;

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that Eakin probably made the deed to him at Sappington's request ; that he never had any conversation with Eakin about it, nor any agreement with Sappington that it should be made ; that he did not know when the deed was made and does not know that it was ever delivered to him ; that it was probably put on record without being delivered to him.

J. H. Cordell's testimony showed that the note for \$3,000 was given by Barney and Frank Sappington, wholly in lieu of the note of \$3,000, on which Elzea was surety ; and that the balance for which the original note was given began about September or October, 1873 ; and that when the note was given the balance amounted to over \$3,000, and Barney Sappington then paid the excess over \$3,000, and gave the note for the remainder. He knew nothing of the consideration of the land being embraced in, or in any way connected with, the note, and expressed surprise at the mention of such a claim.

The evidence further shows : That about the tenth of December, 1873, Barney and Frank Sappington and E. D. Montague and the firm of Cordell & Montague, entered into the arrangement mentioned in the testimony, whereby Barney and Frank Sappington executed to the firm of Cordell & Montague their joint promissory note for the sum of \$3,000, in lieu of the note for the same amount then held by Cordell & Montague against Barney Sappington as principal and I. N. Elzea as his surety ; and Barney Sappington, by his deed of trust, conveyed to Will H. Wood, as trustee, the southwest quarter of southwest quarter of southeast quarter of the same section adjoining the land in question, and on which he had a dwelling-house in which he lived, in trust to secure Frank Sappington against his liability as his surety on said note, stipulating in said deed that said note, interest and costs were to be paid by said Barnabas Sappington, and if they were not paid by him that said conveyed land should be sold and the proceeds applied to the payment of the same ; said note being

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dated the tenth of December, 1873, and said deed of trust being dated the eleventh of the same month and recorded on the same day.

There were three suits brought by Saline county against Barnabas Sappington and his sureties. One was commenced January 23, 1874, and was served January 27, 1874, by Frank Sappington, sheriff, by Soper, deputy. Another filed February 20, 1875, and another filed August 9, 1875. Frederick M. Fulkerson was a defendant in two of said suits. The county recovered judgment in all of the suits, and the sureties paid all three.

G. L. Hays and *A. M. Hough* for appellants.

The transfer from Montague to Frank Sappington, had the effect to vest the legal title in Frank Sappington, the equitable title being in Barney Sappington, for the benefit of Saline county, for the following reasons: (1) It was made at the instance and for the benefit of Barney Sappington, the equitable owner of the land, with the intent, on the part of Barney Sappington, to hinder, delay and defraud his creditors; and that Frank Sappington had notice of, if he did not participate in, such fraudulent design of Barney Sappington. *Craig v. Zimmerman*, 87 Mo. 475; *Henderson v. Henderson*, 55 Mo. 534; *Ryland v. Collier*, 54 Mo. 513; R. S., sec. 2497. (2) It was voluntary and without consideration, and Barney Sappington was at the time insolvent. *Lionberger v. Baker*, 88 Mo. 447; *Patten v. Casey*, 57 Mo. 118; *Bohanon v. Combs*, 79 Mo. 305; *Lillard v. Shannon*, 60 Mo. 522; *State v. Kountz*, 83 Mo. 323. (3) It was a secret trust for the benefit of Barney Sappington. *State v. Jacobs*, 2 Mo. App. 183. The land was acquired and paid for by Barney Sappington, by an unlawful and fraudulent conversion of funds belonging to Saline county which were in his hands as treasurer of said county; and the

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legal title placed in James H. Eakin, and by him conveyed to Montague and by Montague to Frank Sappington, with the purpose, on the part of Barney Sappington, of fraudulently concealing his interest in the land, and of keeping the land out of reach of the county; and also of concealing his unlawful conversion of the money of the county paid for it; and Frank Sappington had notice of these facts or such knowledge as to put him on inquiry. Authorities cited in argument.

Samuel Boyd and *F. P. Sebree* for respondents.

(1) The evidence entirely fails to support the charges of the petition. In this, *first*, it fails to show any fraudulent intent in any of the persons named, or in the transactions named or referred to. *Second*. It fails to show any act of defendant, Frank Sappington, by which plaintiffs or any other person was either defrauded or damaged. *Third*. It fails to show any damage suffered by plaintiffs or their ancestor, or by Saline county, by any transaction concerning the land in suit. (2) The evidence shows an honest debt due Cordell & Montague from B. Sappington in December, 1873, and Sappington had the right to secure it in preference. *Henderson v. Henderson*, 55 Mo. 534; *Shelley v. Booth*, 73 Mo. 74; *Singer v. Goldenberg*, 17 Mo. App. 549; *Colbern v. Robinson*, 80 Mo. 541. Even if in insolvent circumstances, B. Sappington had the right to sell his property at a fair price to secure an honest debt. *Dougherty v. Cooper*, 77 Mo. 528. The evidence shows no fraudulent intent on the part of Frank Sappington, and the finding was for the right party. *Boyles v. Kepler*, 79 Mo. 558. The bond for title and deed from Montague to Frank Sappington was for a valuable consideration, and not a mere voluntary deed. See Tiedeman, Real Estate, sec. 802. (3) There is no pretense that the evidence shows that Frank Sappington had any knowledge or information of any transactions between Eakin and Barney Sappington, or

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between Cordell & Montague and Barney Sappington, or between Barney Sappington and Montague, except what the records show. The evidence does show that Frank Sappington purchased the land in suit in good faith at a fair value, and that the purchase money was fully paid by him and applied to the payment of an honest debt of B. Sappington, and his purchase cannot equitably be disturbed. *Craig v. Zimmerman*, 87 Mo. 475; *Wineland v. Coonce*, 5 Mo. 296; *Hewe v. Waysman*, 12 Mo. 169; *Dougherty v. Cooper*, 77 Mo. 528; *Formler v. Moore*, 77 Mo. 651; *Shelley v. Booth*, 73 Mo. 75; *Ryan v. Young*, 79 Mo. 30; *Fury v. Kempin*, 79 Mo. 477; *Funkhouser v. Lay*, 78 Mo. 548. (4) The claim that plaintiffs are in pursuit of "trust fund," and the authorities cited by appellant, have no application under the facts as shown by the evidence in this case. If any "trust fund" has to do with this case at all, it was converted more than ten years before the institution of this suit. *Rogers v. Brown*, 61 Mo. 187; *Nelson v. Brodhack*, 44 Mo. 596; *Page v. Dixon*, 59 Mo. 47.

GANTT, P. J.—This is a suit in equity to obtain a decree of title to a tract of land, containing about ten acres, near Marshall, Saline county, Missouri. The plaintiffs are the heirs at law of Frederick Fulkerson, deceased, and the defendants are Barnabas Sappington and the heirs at law of Frank Sappington, who has died since this cause was submitted.

From 1868 to 1874, Barnabas Sappington was treasurer of Saline county. He was a man of small means. As treasurer he kept his account with the banking house of Cordell & Montague. In 1871, Barnabas Sappington bought of John W. Bryant the lands in suit, and in payment therefor gave a check on Cordell & Montague for \$2,100. He caused Bryant to convey the land to one J. H. Eakin. Eakin held the land in this secret trust from September, 1871, until February

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12, 1873, when, at the request of Barnabas Sappington, he conveyed it to E. D. Montague. Montague also held it in secret trust. He gave nothing for the land, nor was there any written evidence of how he held it.

In the fall of 1873, Barnabas Sappington became and was wholly insolvent. His financial condition became known, and, in obedience to public demand, he resigned his office of treasurer on December 23, 1873. At the time of his resignation he was indebted to Saline county and its different funds to the amount of \$6,000. In October or November, he made a note to Cordell & Montague for \$3,000, with Isaac N. Elzea as security.

When Elzea learned in December, that Barnabas was about to default, he demanded to be released from the note. Barnabas then applied to his brother, Frank Sappington, to go on this note as surety instead of Elzea. Frank Sappington, in his answer, alleged that Elzea insisted on being released as surety, and makes the very peculiar allegation "*that said Montague was not able to pay the same,*" and proceeds to set up *that for the purpose of securing Cordell & Montague and releasing* Elzea, he, Frank, as surety, signed a new note to Cordell & Montague for \$3,000, payable three years after date, and bearing date December 10, 1873. On the eleventh of December, Barnabas Sappington executed a deed of trust, whereby he conveyed his homestead of nine and one-half acres near Marshall, to save Frank Sappington from loss by reason of his suretyship on said note to Montague and Cordell.

Frank Sappington testified as to his becoming a party to the note as follows: "At the time the arrangement was entered into between myself, Montague and Barney, *I heard rumors of Barney's condition.* Before signing the note in Elzea's stead, I examined the records to see the condition of the title to the land in suit, to ascertain whether I would be safe, and found, as I supposed, that I would be;" that he did not make further inquiry, when he heard rumors of

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Barney's condition, because he thought it was none of his business; that it was a *delicate matter* to be inquiring into another man's financial condition; that Barney, his brother, came to him to go on the note to release *Elzea*, and after examining the title he consented to do so; that he was not present when Montague executed the written contract of sale from Montague to him; did not know that they were delivered to him before it was recorded; that Barney might have had that and the deed of trust securing the note recorded and delivered to him afterwards; that he knew early in January, 1874, of Barney's default; that he paid the note as the indorsements appeared on it as follows: \$300 April 19, 1875; \$1,442.44, December 10, 1875; the remainder in small payments from May 23, 1876 to December 24, 1878; that in a recent sale of Barney's homestead to Leverett Leonard he had reserved all of the amount paid by him on the note to Cordell & Montague, over and above the \$1,500 consideration for the land in controversy.

Barnabas was a witness, in behalf of Frank and himself. He does not explain in his testimony how Montague came to make this contract with Frank in his absence. He does not inform us whether he consented to that contract or not. He does not explain how it was, that he still remained liable on the \$3,000 note to Cordell & Montague and kept his own home mortgaged for its payment, whereas, if the sale to Frank was *bona fide*, Frank owed half of that sum himself to Cordell & Montague.

Cordell & Montague were witnesses also, but they cannot explain this. Indeed, Cordell was astonished to learn that it was claimed that Frank's contract for the land had anything to do with this note. He disclaimed it.

Frederick Fulkerson who was one of Barnabas Sappington's sureties on his official bonds, and who was sued for his defalcation, bought the land in suit at the

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execution sale under the judgment in favor of Saline county against Barnabas and his sureties. His deed is dated June 15, 1878. E. D. Montague conveyed the land to Frank Sappington on March 6, 1879.

The circuit court found for the defendant and dismissed plaintiffs' bill, and from that decree they appeal to this court.

The purchase of this land by Barnabas Sappington, and his ownership of it, from the beginning to the end, have all the badges of fraud. It was paid for by an illegal use of the county's funds in his hands as treasurer. The title was taken in Eakin on the flimsy pretense that he did this because he could buy it cheaper in this way; but why keep it in Eakin's name, after the occasion for so doing ceased?

But the secret trust did not end with Eakin. After keeping it in Eakin's name from September 30, 1871, to February 12, 1873, without consulting Montague, he caused Eakin to convey it to Montague. It remained covered up in Montague's hands, until the public clamor demanded his resignation as treasurer. Knowing that he was a defaulter to the amount of \$6,000, he did not convey this land to his sureties, who must make good his default, but he voluntarily, and in the absence of Frank Sappington, had Montague make out and acknowledge the contract of sale to Frank Sappington. This so-called contract smacks strongly of fraud throughout. There is no colloquium as to the value of the land. No agreement by Frank to pay \$1,500 for it; not a word as to how this sale came to be made.

The giving of three years' time to a hopelessly insolvent man was itself a badge of fraud. But more than this, if Frank Sappington bought this land that day and the consideration is a part of the note, why is Barney Sappington still securing Frank for \$3,000, and why is Barney taking the money that he owed the county and his sureties, and paying interest on Frank's half of \$3,000? Why swell the amount of his indebtedness?

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But this contract stands upon this paper writing alone. An instrument executed voluntarily by an insolvent debtor and placed upon the records of the county to mislead, hinder and delay his creditors. It requires too much credulity to believe, that Frank Sappington, living in the same county seat, having an office in the same courthouse, bearing the relation of brother to Barnabas Sappington, did not know the purpose of this secret trust. According to his own testimony he *heard rumors*, and then deliberately closed his ears.

Frank knew this land was held in secret trust; he knew of Barney's embarrassment; the law stamped Barney's transactions in this land in his financial condition fraudulent as to his creditors, and Frank had such notice in equity and good conscience that he and his heirs cannot be permitted to hold this land exempt from the claim of his creditors and especially of the sureties who have been compelled to make good the very money that went into this land.

As much as we are disposed to defer to the judgment of the trial court in equity cases, we are not able to affirm the judgment in this cause. The facts are so clear that we must draw our own conclusions, and we feel compelled under the evidence in this cause to decide that the contract made and entered into by E. D. Montague, December 10, 1873, and subsequently ripening into the deed of March 6, 1879, from Montague to Frank Sappington was made with the intent to hinder and delay the creditors of Barnabas Sappington; that the sheriff's deed to Frederick Fulkerson conveyed the equitable interest of Barney Sappington, to whose use Montague held said land, and that respondents as the heirs of Frank Sappington hold this land in trust for the appellants; and, so holding, a decree will be entered divesting the title of respondents and vesting it in appellants. All the judges of this division concur.

Felton v. Gregory.

FELTON, *Appellant*, v. GREGORY *et al*.DIVISION ONE.

1. **Supreme Court Practice: EQUITY CASE.** In an equity case the supreme court will review the facts as well as the law.
2. ——— : **AGENCY.** The court finds that the evidence does not establish the authority of a certain firm of real-estate dealers to act for defendant in the making of a contract for the sale of land as the firm assumed to do.

Appeal from Jackson Circuit Court.—HON. T. A. GILL, Judge.

AFFIRMED.

THIS is a suit for specific performance. The plaintiff alleges that, on the thirty-first day of May, 1886, John F. Gregory was the owner of certain lots in Kansas City, Missouri, and by his agent sold the same to plaintiff for \$11,175, of which sum \$200 was paid at the date of the contract, and the balance to be paid at different times thereafter.

The contract provided that the seller should furnish a complete abstract of title, and the principal cash payment should be payable thirty days after that had been done.

The defense admits ownership of the property, denies any sale by defendant, or by anyone authorized by him to make it, and prays for a decree removing cloud on his title by reason of plaintiff's alleged claim, which had been recorded.

The court, on the hearing, found for the defendant, made a decree in accordance with the prayer of the answer, and the plaintiff appealed, after taking the usual formal steps for that purpose.

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Johnson & Lucas for appellant.

(1) This court will review the evidence in an equity case. *Morey v. Staley*, 54 Mo. 419; *Keiser v. Gammon*, 95 Mo. 223. (2) Does the evidence show that the firm of S. T. Warren & Co. were the agents of the defendant Gregory? We answer in the affirmative. *First*. Defendant's own evidence shows that he authorized Ingram to sell the same for \$11,175, of which sum \$5,000 was to be paid in cash and balance in one and two years; that he went with Ingram to S. T. Warren & Co., and agreed with them that he would sell on the above terms, if the sale was made on that day. The sale was so made, and contract signed, and defendant notified thereof. *Smith v. Allen*, 86 Mo. 179; *Hull v. Jones*, 69 Mo. 587; *Mitchum v. Dunlap*, 98 Mo. 421. *Second*. When we look at the whole case, the question of the agency of S. T. Warren & Co. is resolved into a certainty. See the evidence of S. T. Warren, C. P. Smith and W. A. Gosnell, each and all of whom concur in the statement that the contract was made as authorized and directed by the defendant, and he notified thereof. *Clemens v. Potter*, 34 Mo. 584; *Hoffman v. Ins. Co.*, 32 N. Y. 413; *Edwards v. Thomas*, 66 Mo. 482; *Pringle v. Spaulding*, 53 Barb. 17; *Johnson v. Dodge*, 17 Ill. 441.

Traber, Vandever & McNeil and *Warner, Dean & Hagerman* for respondents.

(1) Before plaintiff Felton can obtain a decree for specific performance, he must establish by clear and satisfactory evidence the fact that Warren & Co. had authority to sell the property in question and make a binding contract therefor. *Pierce v. Thomas*, 4 E. D. Smith (N. Y.) 355-6; *Hinds v. Henry*, 36 N. J. Law, 330; *Atwater v. Lockwood*, 39 Conn. 46-50; *Barnard v. Coffin*, 141 Mass. 37. Gregory specifically reserved the

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right to make his own contract for the sale of this property. (2) The trial court found that Warren & Co. had no such authority, and the supreme court will defer somewhat to such finding. *Chapman v. McIlhorth*, 77 Mo. 43; *Smith v. Allen*, 86 Mo. 178. (3) But even if Warren & Co. had authority to sell the property in question, still they were in duty bound to their principal to make a fair contract for him. This they did not do. They exceeded any authority they might have had and made an option contract binding their principal and leaving Felton free. Equity will not enforce such a contract made under such circumstances. *Glass v. Rowe*, 103 Mo. 513; *Ramsey v. West*, 31 Mo. App. 684-685; *Reiger v. Bigger*, 29 Mo. App. 427; *McElroy v. Maxwell*, 101 Mo. 294; *Zeidler v. Walker*, 41 Mo. App. 121; *Marble Co. v. Ripley*, 10 Wallace, 339. (4) The *onus* of establishing by clear and satisfactory evidence a contract which it is sought to have specifically enforced is cast upon the party who sets it up and asks its enforcement, and unless this is done a court of equity will not decree specific enforcement. *Strange v. Crowley*, 91 Mo. 287; *Taylor v. Williams*, 45 Mo. 80; *Veth v. Gierth*, 92 Mo. 97; *Railroad v. McCarty*, 97 Mo. 214; *Lapham v. Dreisvogt*, 36 Mo. App. 275.

BARCLAY, J.—This being a case in equity for specific performance it has been necessary to review the testimony.

Plaintiff claims the rights of a buyer under a contract entered into by him, in May, 1886, with a firm of real-estate agents, who assumed to act for Mr. Gregory, whose land formed the subject-matter of the alleged sale.

A vital part of plaintiff's case is to establish the agency of the firm mentioned to enter into the contract sought to be specifically enforced.

The evidence on this subject is conflicting. After a thorough consideration of it, we do not think there is any preponderance in plaintiff's favor to support the

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proposition that the agreement, as made by the firm who signed it in the name of Mr. Gregory, was authorized by him.

The finding of Judge GILL, who had the parties before him at the trial on the circuit, was to the same effect.

We consider the result there reached correct, and affirm the judgment, all the members of this division concurring.

DICKSON V. THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant.

DIVISION TWO.

1. **Practice : INSTRUCTION : ASSUMPTION OF FACT.** The assumption in an instruction of a fact of which there is some proof and no controverting evidence will not constitute reversible error.
2. **Negligence : INSTRUCTION : PROXIMATE CAUSE.** An instruction in an action against a railroad for personal injuries, which tells the jury, that if they found the injury was caused by the failure of defendant to station a watchman at the crossing in question, the defendant was liable unless the plaintiff was guilty of negligence, directly contributory to the accident, is not erroneous because it does not require that the absence of the watchman must have been the direct and proximate cause of the accident.
3. ——— : **CITY ORDINANCE : WATCHMAN.** The object of a city ordinance, in requiring railroads to station a watchman at street crossings used by them, is to prevent travelers from going on the crossing when trains are approaching, and not to give warning of danger when it is too late to avoid it.
4. ——— : **RINGING BELL : QUESTION FOR JURY.** Whether a bell of a locomotive was ringing is, in a case of conflicting evidence, a question for the jury, and the supreme court will not disturb its finding thereon, even where it appears to be against the weight of the evidence.

104	491
114	50

104	491
142	352
143	500
143	607

104	491
157	641

104	491
163	490

104	491
164	286

104	491
91a	375

104	491
94a	41
e94a	48

104	491
96a	5671
100a	5621

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5. ——— : ALLEGATIONS AND PROOF. Evidence that the company's servants in charge of the train discovered plaintiff's peril in time to have averted the injury is admissible under the averments of the petition, that the defendant's agents negligently moved and managed the train by which the injury was occasioned.
6. ——— : SURROUNDING CIRCUMSTANCES. Whether or not a person's acts constitute negligence must be determined in view of the surrounding circumstances.
7. **Contributory Negligence.** The question of contributory negligence in this case *held* to be one for the jury.
8. **Negligence : DRIVER OF VEHICLE : INJURY.** The negligence of the driver of a vehicle, he not being in the employment or under the control of the person injured while riding thereon, cannot be imputed to the latter.

Appeal from the St. Louis City Circuit Court.—HON.
L. B. VALLIANT, Judge.

AFFIRMED.

B. Pike for appellant.

(1) Defendant's demurrers to the evidence, at the close of the plaintiff's case and at the close of the whole evidence, should have been given. *Matti v. Railroad*, 32 Am. & Eng. R. R. Cases, 73; *Railroad v. Davis*, 32 Am. & Eng. R. R. Cases, 65; *Henze v. Railroad*, 71 Mo. 638; *Gurley v. Railroad*, 93 Mo. 450; *Rafferty v. Railroad*, 91 Mo. 37; *Harty v. Railroad*, 95 Mo. 368; *Field v. Railroad*, 76 Mo. 616; *Braxton v. Railroad*, 77 Mo. 458; *Collins v. Railroad*, 65 Mo. 232; *Waldheir v. Railroad*, 71 Mo. 514; *Collins v. Railroad*, 65 Mo. 230; *Cooley on Torts*, 679; *Shear. & Red. on Neg.*, sec. 488. (2) the court committed error in admitting testimony as to there being no watchman at the foot of Gratiot street, and no flag displayed there at the time of the accident. *Railroad v. Goran*, 31 Am. & Eng. R. R. Cases, 170. (3) The instructions given at the instance of plaintiff were erroneous. *Stoher v. Railroad*, 91 Mo. 518; *Dowling v. Allen*, 38 Mo. 299; *Cooley on Torts*,

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679 ; Shearman & Red. on Neg., sec. 488, and cases cited under first point. (4) The court erred in refusing the instructions asked by defendant.

D. P. Dyer for respondent.

(1) The position taken by the appellant, that the jury were legally bound to find that the bell on the engine of the appellant was being constantly rung, is without merit. *Murray v. Railroad*, 101 Mo. 236, 242. (2) The facts of the case do not conclusively establish contributory negligence on the part of either the driver or of the plaintiff; they do not even establish *prima facie* proof of such negligence. But, if the driver had been negligent, the plaintiff would not have been affected thereby. *Beck v. Railroad*, 13 S. W. Rep. 1053, and cases cited; *Land Co. v. Mingea*, 89 Ala. 521, and cases cited; *Mills v. Armstrong*, L. R. 13 App. 1; *Borough of Carlisle v. Brisbane*, 113 Pa. St., pp. 552, 553. (3) The levee or First street and Gratiot street were cross or intersecting streets within the meaning of the ordinance. *Wilkins v. Railroad*, 101 Mo. 93. (4) The facts which rendered these streets cross or intersecting streets were established by uncontroverted evidence, and by the appellant's and the respondent's witnesses; they were assured and tacitly conceded by the counsel on either side; and the court could, therefore, with propriety, assume the existence of them. *Bank v. Hatch*, 98 Mo. 376; *Waller v. City*, 99 Mo. 647; *Pope v. Kansas City, etc., Co.*, 99 Mo. 400. Indeed, the court might probably have taken judicial notice of these facts in the absence of evidence. *Brady v. Page*, 59 Cal. 52; *State v. Ruth*, 14 Mo. App. 228; *Pearce v. Longfit*, 101 Pa. St. 512. (5) The evidence sufficiently showed that the absence of the watchman was the proximate cause of the injury. *Murray v. Railroad*, 101 Mo. 236, 242; *Wilkins v. Railroad*, 101 Mo. 103. Indeed, the jury were bound so to find. *Schlereth v. Railroad*, 96 Mo.

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509. (6) It was not necessary for the plaintiff to plead that defendant's engineer saw, or by the exercise of reasonable care could have discovered, the plaintiff's peril in time to have averted the injury. That matter could be shown to obviate contributory negligence on the part of the plaintiff without being pleaded, and the evidence was used only for that purpose. *Kellny v. Railroad*, 101 Mo. 75; *Hilz v. Railroad*, 101 Mo. 56. And, if it had been necessary to plead it, the defendant is not in a position to avail itself of any failure of the plaintiff to plead it. *Hilz v. Railroad*, 101 Mo. 41. And, finally, in case it had been necessary to plead such default on the part of the engineer, the allegations of the plaintiff's petition are sufficiently broad to have rendered the claim available. *Sullivan v. Railroad*, 97 Mo. 113.

THOMAS, J.—This is an action for personal injuries. Respondent obtained judgment in the circuit court of the city of St. Louis for \$3,875, and the defendant has appealed.

The allegations of the petition with respect to the cause of the injuries complained of are, in the first place, that these injuries are attributable to the carelessness and negligence of the defendant, its servants and agents, in the negligent and careless manner in which the engine and cars were managed and moved. The petition further sets out, as causes of these injuries, the violation of ordinances of the city of St. Louis, which contain the following provisions, namely: *First*. That it shall not be lawful for a corporation to run cars propelled in whole or in part by steam along or across any improved street, unless such corporation shall station at each cross or intersecting street a watchman, who shall display at the crossing of cars in the daytime a red flag, and in the night time a red light. *Second*. That it shall be unlawful for an engineer to run any car or cars along or across such street, unless such watchman is stationed

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at each and every cross or intersecting street with said signals; and, *third*, that, whenever an engine shall be moving in said city, the bell of such engine shall be constantly sounded. The answer of defendant was a general denial, and a plea of contributory negligence on the part of plaintiff.

The facts are briefly these: The plaintiff and Francis Hanlon were in the employ of John O'Brien, whose place of business was at Main and Biddle streets, in the city of St. Louis. On December 13, 1887, they were on a wagon, which was in the charge of, and being driven by, John Murphy, a driver for O'Brien. To this wagon was fastened a smokestack, which was about twenty feet long, and thirty-six inches in diameter, and the wagon was taking the plaintiff, Hanlon and the smokestack from said O'Brien's place of business to the Iron Mountain depot, which was on the levee, a short distance below Gratiot street, and for this purpose was being driven southwardly down the west side of the levee in said city. Murphy sat in front and did the driving, while the plaintiff and Hanlon sat on the smokestack, the plaintiff at the front, and Hanlon at the rear, end.

While the wagon was being thus drawn southwardly down the levee, and when it had come within a very few feet of the crossing of Gratiot street, an engine came from the south and stopped near that crossing. The levee was covered with quite a number of railroad tracks. The westernmost was that of the defendant. In driving down the levee to the Iron Mountain depot, a wagon would have to go along that side of the levee, which lay west of the track of the defendant. The space left to the west of the track, and in which the wagon would be driven, was forty feet wide for the most part, but narrowed towards Gratiot street, until at the corner of that street, on the north side, it was only five feet from the curbstone to the track. When Murphy saw this engine he stopped the

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wagon and he, plaintiff and Hanlon watched its movements. The engine finally stopped. When Murphy saw that, owing to the engine in front of him, he could not cross the levee as he had intended, he concluded to turn into Gratiot street, and proceeded to do so. In so doing, his wagon necessarily came upon the track, and was struck by the defendant's engine, which came from the north or rear of the wagon, and by this collision the plaintiff suffered injuries, and it is for these that he sued and recovered in this action. It is conceded that the evidence shows that defendant had no watchman at the crossing when and where the accident occurred. The ordinance referred to in the petition was read in evidence.

At the instance of plaintiff, the court instructed the jury as follows: "1. If the jury find from the evidence that Gratiot and First or Levee streets, where the two intersect, were improved on each and every side of the railroad tracks extending along said First or Levee street, by being macadamized or otherwise improved with such other material usually used in the construction or reconstruction of streets, then it became the duty of the defendant to station a watchman at the intersection of said streets, and a failure to do so would be negligence on its part, and, if you find that the injury complained of by plaintiff was caused by such negligence on the part of the defendant, then the plaintiff is entitled to recover in this action, if you further find from the evidence that neither the plaintiff nor the driver of the wagon on which he was then riding was guilty of such negligence as directly contributed to the accident that caused the injury.

"2. If the jury find from the evidence that the defendant's agents and servants in charge of the engine that struck the wagon upon which plaintiff was riding did not, while said engine was in motion, constantly sound the bell thereon, and that in consequence thereof the injury complained of was occasioned, then the

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plaintiff is entitled to recover, unless you shall further find that the plaintiff or the driver of the wagon was guilty of such negligence as directly contributed to the accident that caused the injury.

"3. If the jury find for the plaintiff they will assess the damages at such sum as they may believe from the evidence will compensate him for loss of time, expense incurred for medical attendance, and all mental and bodily pain and anguish he has suffered, together with such sums as will compensate plaintiff for any permanent injury or incapacity (if any) they may believe from the evidence he has sustained by and from such injuries so received and resulting directly therefrom.

"4. Although you may believe from the evidence that the plaintiff and the driver of the wagon, upon which plaintiff was at the time of the accident riding, were guilty of negligence in going upon the railroad track, yet if you further find from the evidence that the danger in which the plaintiff was thus placed was discovered, or by reasonable diligence could have been discovered by the person in charge of the engine in time to have prevented the accident, then the plaintiff is entitled to recover in this action notwithstanding such negligence on the part of the plaintiff or the driver of said wagon."

To the giving of which instructions and each of them defendant at the time excepted. The defendant prayed the court to give the following instructions:

"The court instructs the jury that under the pleadings and all the evidence in this case plaintiff is not entitled to recover."

"The court instructs the jury that they will disregard all the evidence offered by plaintiff as to there being no watchman at the foot of Gratiot street."

Which instructions the court refused to give, to which action of the court defendant at the time excepted.

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The defendant asked, and the court gave, the following instructions: "5. The court instructs the jury that if they believe from the evidence that the driver in charge of the wagon on which plaintiff was riding at the time of the accident did not constantly look both north and south to ascertain whether an engine or train was approaching on the track on which the wagon was struck, and did not listen for the sound of a bell or whistle thereon, and plaintiff got upon said track and was struck in consequence of such failure to look and listen, then plaintiff cannot recover in this action.

"6. The court instructs the jury, that if they believe from the evidence that plaintiff at the time of and immediately before the accident did not constantly look both north and south to ascertain whether an engine or train was approaching on the track on which the wagon on which he was riding was struck, and did not listen for the sound of a bell or whistle thereon, and got or went upon said track and was injured in consequence of such failure to look and listen, then plaintiff cannot recover in this action."

I. Four specific objections to instruction, numbered 1, are urged upon our attention: *First*. That there was no evidence that Gratiot street intersected the levee, or that the levee was a street at all, and hence the ordinances of the city did not require defendant to keep a watchman at the point where the injury occurred. *Second*. That the instruction assumes that the levee is a street, and that Gratiot street intersects it. *Third*. The instruction is defective in not telling the jury that the absence of the watchman, in order to constitute actionable negligence against defendant must have been the direct, proximate cause of the injury, and, *fourth*, that the injury did not occur on the crossing, and for that reason the principle of the instruction did not apply. The case seems to have been tried by both parties upon the theory that the court, jurors and attorneys knew the exact *status* of the levee as a public thoroughfare,

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and its relation to Gratiot street. It is alleged in the petition to be a street and that Gratiot street intersects it, and the defendant makes no special denial of this, but rests its defense on a general denial and a plea of contributory negligence.

Witness Dogwell, a civil engineer, made measurements and a plat of the *locus in quo*, which were given in evidence, but the plat is not in the record. What this showed we are left to conjecture. But the engineer who made the plat testified that the foot of Gratiot street and adjacent levee are improved, reconstructed with granite; that the streets above the intersection of Gratiot street and the levee are improved streets on both sides of the railway track.

During the trial the attorneys for both parties as well as the witnesses speak of the levee as a street and the junction of Gratiot street and the levee as a crossing. It is true defendant objected to the reading of the ordinances in evidence on the ground there was no proof that there was any crossing at the point of the accident, but defendant's attorney after this assumes in the questions put to the witnesses that there was a crossing there. We think this evidence, and the manner in which it was elicited, justified the court in assuming that the levee is a street and that Gratiot street intersects it. The trial occurred in the city of St. Louis, and defendant's counsel seems, by his examination of witnesses, to have conceded this fact, which no doubt was well known to all parties connected with the trial. The court assumed no more in the instructions than defendant's counsel assumed in the conduct of the trial.

Where it is manifest that a fact exists, the court would not be justified in granting a new trial simply to permit a party to make more elaborate proof of it. From this record we feel satisfied beyond a reasonable doubt that the levee is a street, and that it is intersected by Gratiot street. The assumption in an instruction of

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a fact, of which there is some proof, when there is no countervailing evidence as to that fact, is not reversible error. *Bank v. Hatch*, 98 Mo. 376; *Carroll v. Railroad*, 88 Mo. 239; *Walker v. Kansas City*, 99 Mo. 647; *Pope v. Railroad*, 99 Mo. 400.

Nor was this instruction defective in failing to tell the jury that defendant was not liable in this action unless the absence of a watchman at the crossing was the direct, proximate cause of the injury. The instructions must all be read together and construed as a whole. The instruction under review told the jurors that, if they found that the injury "was caused" by the failure of defendant to station a watchman at that crossing, the defendant was liable unless the plaintiff or the driver of the wagon on which plaintiff was riding was guilty of negligence also, which directly contributed to the accident. And on the part of the defendant the court instructed the jurors that plaintiff could not recover if he failed to look constantly both ways for approaching trains and to listen for the sound of a bell or a whistle, and he was injured in consequence of such failure. Taking the instructions, therefore, as a whole, it seems clear that the jurors could not have misconstrued the word "caused" in its relation to the facts of the case and the issues as presented by the court. If the defendant's negligence caused, and plaintiff's negligence did not directly contribute to, the injury, it follows logically that it was the direct and proximate result of defendant's negligence.

It is insisted that this instruction ought not to have been given, because the evidence shows that the wagon was not on the crossing at the time of the accident. This contention is untenable. The evidence shows that the wagon stopped from fifteen to forty feet north of the crossing, in order that the party in charge of it might ascertain whether the switch engine in front of him would interfere with his progress. When he saw that this engine had stopped, he drove his wagon four or

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five steps before the collision occurred. This must have brought him very near the crossing, and it was his evident intent, indeed it was necessary for him, to go upon the crossing to turn up Gratiot street. The object of requiring a watchman to be stationed at the intersection of the improved streets of the city is to prevent travelers from going upon the crossing when trains are approaching. *Wilkins v. Railroad*, 101 Mo. 93.

It would be a work of supererogation to station a watchman at a point to give warning of danger after it is too late to avoid it. It is the duty of such watchman to keep the crossing clear at times of danger from moving trains. If one had been at the intersection of Gratiot street and the levee at the time of this collision, it would have been his duty to give plaintiff and the driver of the wagon warning of the approaching train, before the wagon was driven onto the crossing; and hence the jurors might very well find that the injury occurred because no watchman was there at the time. The failure to station a watchman at a crossing when required by ordinance has been held negligence *per se*. *Schlereth v. Railroad*, 96 Mo. 509; *Wilkins v. Railroad*, *supra*; *Murray v. Railroad*, 101 Mo. 236.

II. Defendant contends that there was no evidence in the case justifying the giving of instruction, numbered 2. We confess that the preponderance of the evidence seems to be in favor of the proposition that the bell was constantly sounded. The plaintiff and Murphy testified that they heard no bell, and they were in a position to have heard and could have heard it, if one had been rung, and Hanlon said he heard no bell. Plaintiff also called Mohoney, defendant's engineer in charge of the engine that caused the injury, and he testified that the bell was constantly rung from the time he left Union depot till the accident occurred. Pat Carr, the fireman of the colliding engine, and Thomas Kick, foreman of defendant's levee crew, called as witnesses by defendant, testified that the bell was rung all the way down from Poplar street to Gratiot.

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The weight of the evidence on this issue seems to us to be on the side of the defendant. Where the witnesses are of equal credit, positive evidence that a signal was given is as a general rule of more weight than that of witnesses who say they did not hear it. Much depends upon the position, attention and credibility, however, of the witnesses, and the ultimate question, whether the signal was given or not, is one of fact for the jury. There was some evidence that the bell was not rung, and this issue was properly submitted to the jurors, and in this conflict of evidence the lower court did not, and we think we ought not to, interfere with their finding. *Murray v. Railroad, supra.*

III. It is contended again that there is no allegation of the petition which authorized the giving of instruction, numbered 4, *supra*. The allegation is that the injuries inflicted on plaintiff were "solely attributable to the carelessness and negligence of the defendant, its servants and agents, in the negligent and careless manner in which said engine and cars were managed and moved." This is a substantive, independent averment, not connected with the other charges of negligence contained in the petition, and was broad enough to admit evidence that the agents of defendant in charge of the colliding engine discovered plaintiff's peril in time to have avoided the injury and failed to do so. Evidence having been adduced on this issue, the court committed no error in giving the instruction under review. *Bliss Code Plead., sec. 211a; Ellet v. Railroad, 76 Mo. 518; Garner v. Railroad, 34 Mo. 235; Goodwin v. Railroad, 75 Mo. 73; Schneider v. Railroad, 75 Mo. 295; Mack v. Railroad, 77 Mo. 232.* We know the principle of these decisions has been, by the later deliverances of this court, somewhat restricted in its application. *Crane v. Railroad, 87 Mo. 588; Gurley v. Railroad, 93 Mo. 445.* But we do not deem these antagonistic to the position assumed. *Sullivan v. Railroad, 97 Mo. 113; Pope v. K. C. C. Co., 99 Mo. 400.* The *allegata* and

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probata corresponded in the case at bar. The averment is that the defendant's agents negligently moved and managed the train, by which the injury was occasioned. The proof is that the engineer discovered plaintiff's peril in time to have stopped the train and avoided the collision by the exercise of ordinary care, but failed to do it.

We will add, that we have not in this examination overlooked the case of *Waldhier v. Railroad*, 71 Mo. 514. There the court held, and properly held, that the plaintiff, under an allegation of the negligent management of trains, could not introduce evidence of a defective frog in the track.

IV. This brings us to the consideration of the contention of defendant that the court ought to have sustained a demurrer to the evidence. What we have already said renders it unnecessary to add anything in this place in regard to the evidence of the negligence of defendant's servants in managing the train, and of defendant itself in not stationing a watchman at the crossing in question. It only remains for us to determine whether the proof shows that plaintiff was guilty of such contributory negligence that the court ought to declare, as a matter of law, that he cannot recover. The evidence shows that Murphy was driving the wagon upon which there was a boiler twenty feet long and thirty-six inches in diameter; that plaintiff was sitting in the front end of this boiler; the wagon was driven down to within a few feet of the crossing and was stopped because a switch engine approached the crossing in front of them; the parties on the wagon were all watching this engine, which prevented Murphy from driving across the street as he had intended to do, and determined him to turn into Gratiot street; that the defendant's western track approached so near the curb at the corner of Gratiot street and the levee it was impossible for the wagon to pass into Gratiot street without running over defendant's track; that Murphy moved his

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wagon four or five steps in attempting to pass into Gratiot street when the collision occurred. The plaintiff was sitting in the boiler, so that, by looking backwards through it, it is probable he would have seen the train that caused the injury in time to have jumped from the wagon and got out of the way. We think this state of facts presents a case in which the court cannot assume, as a matter of law, that plaintiff was guilty of such negligence as directly contributed to his injury.

A man's acts must be judged by the concomitant circumstances. His environment must be taken into the account, and we cannot assume that plaintiff's conduct in this case did not conform to ordinary prudence. The court properly left it to the jury to say whether plaintiff was guilty of negligence which directly contributed to his injury. Indeed, the court went further than the correct rule of the law warrants in the limitation of plaintiff's right of recovery on the score of contributory negligence. The jury was told in the first instance that if he or the *driver of the wagon* was guilty of negligence which directly contributed to the accident, there could be no recovery. The negligence of the driver in this case, he not being in the employ or under the control of plaintiff, cannot be imputed to plaintiff. This seems to be now the settled doctrine in England and the United States. *Becke v. Railroad*, 102 Mo. 544; *Land Co. v. Mingea*, 89 Ala. 521; *Borough of Carlisle v. Brisbane*, 113 Pa. St. 552; *Mills v. Armstrong*, L. R. 13 App. Cas. 1. In the second place the instruction predicated plaintiff's right of recovery on the condition that he *constantly looked both ways* for approaching trains. It is not possible for a man to look *constantly* both ways, and the law does not require it. But as both of these errors were favorable to defendant, it, of course, has no right to complain.

Upon the whole, we think the case was fairly tried. Judgment affirmed. All of this division concur.

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PITKIN *et al.*, *Plaintiffs in Error*, v. REIBEL *et al.*

DIVISION TWO.

1. **Tax Deed: FORM PRESCRIBED BY STATUTE.** Where the statute prescribes a particular form for a tax deed, such form becomes substance and must be strictly followed or the deed will be void.
2. **Tax Sale: ASSIGNEE OF PURCHASER: DEED: STATUTE.** The revenue act of 1872 (2 Wag. Stat., pp. 1205-6, sec. 207) makes certificates of purchases at tax sales assignable "by indorsement thereon under the hand of the purchaser." Section 216 authorizes the collector to make a deed to the assignee, but requires the deed to recite the fact of the assignment; and section 217 prescribing the form of the deed requires a recital that the indorsement was under the hand of the purchaser written on the back of the certificate of purchase. *Held* that a deed simply reciting that the purchaser had assigned to the grantees all his "right, title and interest in and to said land" was void because not substantially complying with the statute.
3. **Tax Deed: LIMITATION.** The tax deed being void the statute of limitations provided by section 221 of said act of 1872 did not run.
4. ———: **SUCCESSFUL CLAIMANT: REIMBURSEMENT OF TAXES PAID.** Recovery can be had for taxes paid, by an assignee or person claiming under the purchaser at the tax sale, under section 219 of said act of 1872, which provides that if the holder of a tax deed or one claiming under him by virtue thereof be defeated in an action for the recovery of the land he may recover of the successful party "the full amount of the taxes paid by the tax purchaser at the time of the purchase and all the subsequent taxes paid by him," interest, etc.
5. ———: ———: ———. Though the tax deed is insufficient to transfer title, still it is sufficient evidence of the assignment, to enable the grantee to recover the taxes paid.

Appeal from Scotland Circuit Court.—HON. B. E. TURNER, Judge.

REVERSED AND REMANDED.

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McKee & Jayne for plaintiffs in error.

The court erred in finding for defendants in matter of possession. 2 Wag. Stat., secs. 216, 217, p. 1205, and secs. 218, 219, p. 1206; *Railey v. Guinn*, 78 Mo. 635. The court erred in refusing to find and render judgment for plaintiffs, and in their favor, for an amount equaling the amount by them paid at tax sale, as purchase money, and the taxes on the lands by them subsequently paid, with interest, when it found in defendants' favor in the matter of recovery. 2 Wag. Stat., sec. 219, p. 1205.

John C. Moore for defendants in error.

(1) The writ of error should be dismissed because the court overruled the motion in arrest before overruling the motion for a new trial. *Cincinnati, etc., v. Case*, 23 N. E. Rep. 797; s. c., 122 Ind. 310. (2) The tax deed is fatally defective. It does not comply with the statutory form as to reciting the manner of the assignment of the certificate of purchase. Where the statute prescribes the particular form of a tax deed, the form becomes substance and must be strictly pursued or the deed will be void. Black on Tax Titles, sec. 211, p. 268, and cases there cited; *Duff v. Neilson*, 90 Mo. 93; *Williams v. McLanahan*, 67 Mo. 499; *Callahan v. Davis*, 90 Mo. 78; *Pearce v. Tittsworth*, 87 Mo. 639; *Mason v. Crowder*, 85 Mo. 526. The tax deed being void did not set the special three years' statute of limitations in motion, and defendants being in possession were not required to bring suit. Rehearing decision in *Mason v. Crowder*, 85 Mo. 526; *Pearce v. Tittsworth*, 87 Mo. 635; *Callahan v. Davis*, 90 Mo. 78; *Duff v. Neilson*, 90 Mo. 93.

MACFARLANE, J.—Ejectment to recover possession of the northeast quarter of the southeast quarter, section

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19, township 66, range 10, in Scotland county. The petition is in the usual form.

The answer denies certain allegations of the petition, pleads the ten years' statute of limitations, and sets up specially that plaintiff's claim of title was through a certain tax deed which is copied in full in the answer, alleges that the deed was void and plaintiff acquired no title thereunder.

Plaintiff replied, admitting that his only claim of title was derived through said tax deed, and asked, if his deed was ineffectual to pass the title, that he be given judgment for taxes paid on the land, penalties and interest, and that it be declared a lien on the land.

The south half of said section 19, with other lands, was sold by the collector of the county of Scotland in October, 1872, for the taxes of the year 1871, and one M. Vogel became the purchaser of the whole tract for the sum of \$28.96. On the twenty-eighth day of May, 1875, a deed was made by the collector to plaintiffs as assignees of Vogel, the purchaser, which was duly recorded. The sale was made under the revenue act of 1872, which is chapter 118, 2 Wagner's Statutes. The deed was in exact conformity with the forms prescribed by section 217 of said act, except in two or three particulars, only one of which need be noticed.

In case the certificate of purchase had been assigned by the purchaser, and the deed was made to the assignee, the following recitals were required by the act: "And whereas the said — (purchaser) did by his indorsement under his hand, written on the back of the certificate of purchase to him executed for the tract of land so sold as aforesaid at the time of said sale, said indorsement bearing date the — day of —, A. D. 18—, assign the said certificate of purchase to — (the assignee)." The recital in the deed was as follows: "And whereas said M. Vogel has duly assigned to Pitkin and Leslie all his right, title and interest in and to said lands acquired as aforesaid."

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Plaintiffs also proved the payment of taxes on this land by them for the years 1872, 1873, 1874, 1875 and 1876. The judgment was for defendants and plaintiffs bring the case to this court by writ of error.

I. It has been held by repeated decisions of this court, giving construction to the revenue act of 1872, and other acts, containing similar provisions, that, where the statute prescribed a particular form to be observed in the execution of a deed, that form becomes substance, and must be strictly followed or the deed will be void. *Williams v. McLanahan*, 67 Mo. 499; *Pearce v. Tittsworth*, 87 Mo. 637; *Hopkins v. Scott*, 86 Mo. 145; *Sullivan v. Donnell*, 90 Mo. 281. BLACK, J., in construing the provisions of the charter of Kansas City, which requires the tax deed to be substantially in the form prescribed, and makes it *prima facie* evidence of all its required recitals, says: "There can be no doubt that the deed, to be any evidence at all, must be in substantial compliance with the form. This is the criterion established by the legislature, and we have no power to vary it."

Section 207 of the act of 1872 makes the certificates of purchase assignable "by indorsement thereon under the hand of the purchaser." Section 216 authorizes the collector to make a deed to the assignee, but requires the deed to recite the fact of the assignment, and section 217 prescribing the form of the deed requires a recital that the indorsement was under the hand of the purchaser, written on the back of the certificate of purchase. These requirements were not even substantially complied with in the deed under consideration. The deed simply recites that the purchaser had assigned to plaintiffs all his "right, title and interest in and to said land."

The assignee derives his right to a conveyance from the collector solely from the statute. The statute only authorizes such a conveyance upon the condition that the certificate is assigned, by indorsement in writing

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thereon, under the hand of the purchaser. The deed itself is required to furnish the evidence of the assignment. The deed totally failed to show any of the facts made necessary under the statute to authorize a conveyance to plaintiffs, and did not follow "as near as possible" the form prescribed. Under the authorities cited above, the deed must be held inoperative as a conveyance of the land to plaintiffs.

II. The deed being void, the statute of limitations provided by section 221 of the act of 1872 was never put in motion. *Callahan v. Davis*, 90 Mo. 81; *Duff v. Neilson*, 90 Mo. 93.

III. Plaintiffs having been properly defeated in their claim for the possession of the land, are they entitled to judgment for the amount of taxes paid, with penalties and interest as authorized under section 219, 2 Wagner's Statutes, 1206? The part of the section applicable is as follows: "And if the holder of a tax deed, or the party claiming under him by virtue of a tax deed, be defeated in an action by or against him for the recovery of the land sold, the successful claimant shall be adjudged to pay such party claiming under the tax deed, except in cases where the land was not subject to taxation, or the taxes for which the same was sold were paid before the sale, or it has been redeemed according to law, the full amount of all taxes paid by the tax purchaser on such lands at the time of the purchase, and all subsequent taxes paid by him, together with the amount of the redemption money provided for by law, and interest on the whole amount of such taxes from the time of the payment thereof, at the rate of ten per cent. per annum; which judgment shall be a lien upon the real estate in controversy, and may be enforced by execution as in other cases of judgments and decrees of such court."

It is evident that, giving the statute a strict construction in this particular, as has been given it in construing those provisions relating to the transfer of

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title, no recovery could be allowed. We think no such strict and narrow construction should be given. The provisions for reimbursement are remedial in their nature, and the construction with respect to them should be liberal and according to existing equities. The tax was a charge upon the land. The owners owed a duty, not only to the state, but to every other property-owner and taxpayer in the state to discharge all his duties of citizenship, among the most important and necessary of which is the payment of taxes. There can be no doubt, that, should one pay the taxes of another, though voluntarily, a moral obligation, at least, would arise, to have reimbursement.

Under the act in question the state undertook to adopt methods and provide proceedings to insure the collection of the revenues. Previous laws for the sale of land for the taxes charged against it had been substantially fruitless. Experience had taught that summary proceedings for the sale and transfer of lands for taxes could not be made effectual. Considering the previous laws and their practical insufficiency it is evident that the provision of the act now under consideration was designed to have an equitable operation so as to insure to purchasers, in case of failure of title under a sale, reimbursement for the amount paid to the state. The statute was evidently designed to have an operation in the nature of an equitable subrogation to the liens on the land held by the state. Taking that view of the statute, it is clearly remedial, and should be given a liberal and equitable construction.

Such construction has been given the statute by this court in *White v. Shell*, 84 Mo. 569. In that case the court says: "Statutes like that under consideration are found in the laws of many states. They stand upon grounds of broad equity; are remedial. The owner of the property cannot rightfully complain if he is thus required to discharge his share of the public burdens though the sale be invalid." SHERWOOD, C. J., in a

recent case, in commenting on the case of *White v. Shell*, uses this language: "The purchaser at the tax sale, void though it was, acquired a broad equity; an equity as broad as the general statutory provisions under which he purchased." *Bingham v. Birmingham* 13 S. W. Rep. 208. In the same case, on rehearing, he extends the "broad equities" to the provisions of the charter of Kansas City. 103 Mo. 345.

The statute does not limit the right to recover taxes paid to the purchasers but such right inures to the benefit of the person holding the tax deed, and any party claiming under him, and necessarily includes the assignee of the purchaser.

The person entitled to reimbursement, whether the purchaser, his assignee or person claiming under him, may recover "the full amount of all taxes paid by the tax purchaser at the time of the purchase, and all subsequent taxes paid by him." While the right is given in express terms to recover all the taxes paid by the purchaser, whether at the time of the purchase, or subsequent thereto, the right to recover the amount paid by an assignee, or person claiming under the purchaser, is not expressly given. While the letter of the statute fails to make provision for reimbursement to an assignee for taxes paid by himself, under the liberal interpretation given it, we think it necessarily implied. Authority is given to assign the certificate at any time, and such assignment under the provisions of section 207 "shall vest in the assignee all the right and title of the original purchaser." The rights conferred would, for his protection, impose corresponding duties. One of the rights would be that of obtaining a deed at the end of two years from date of sale. A duty is imposed by section 210, of paying the taxes on the land accruing subsequent to the purchase, and preventing another sale. Certain forfeitures are incurred by a failure to perform this duty. The right of the assignee to pay the taxes, and in case of failure of title to be reimbursed therefor,

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must necessarily be implied, otherwise he does not obtain by the assignment all the rights of the purchaser.

IV. The next, and most troublesome, question is, whether the deed is sufficient evidence to authorize plaintiffs, as assignees, to recover the taxes paid by the purchaser.

The statute (sec. 216) requires the collector to make to the purchaser, or his assignee, a deed of conveyance to the land upon production of the certificate of purchase of the same. "In case the certificate of purchase has been assigned, the collector shall briefly recite that fact in the deed." The assignment vested in the assignee "the right and title" of the original purchaser. The deed recites the assignment of the "right, title and interest of the purchaser, in and to the lands acquired as aforesaid."

It is true the collector is required to recite in his deed certain facts, in reference to the assignment, which were wholly omitted from this one, yet he does recite an assignment; insufficient though it be to make a valid conveyance, it is, we think, sufficient *prima facie* proof of an assignment. We have the right to indulge in the presumption that the collector, as a public officer, did his duty, and required the production of the certificate before the conveyance was executed, and to see that the assignment was indorsed thereon under the hand of the purchaser, as required, before the deed could be lawfully made. *Baker v. Underwood*, 63 Mo. 385; *Eads v. Stephens*, 63 Mo. 90.

The presumption that the assignment was in exact conformity to the requirements of the statute could not be entertained, in order to validate the deed as a conveyance. The manner of the assignment should have been recited in the deed in order to make the deed as a conveyance valid. *Yankee v. Thompson*, 51 Mo. 234.

It is not necessary, as we have seen, in order to recover the taxes, that the sale and deed should be valid.

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Indeed, the right of recovery is predicated upon the invalidity of the deed.

The statute itself seems to have intended the deed to operate in the alternative. If found insufficient, as a conveyance, it should operate as evidence of the purchase and assignment. It provides that if the holder of the tax deed be defeated in an action for the recovery of the land, then the successful claimant shall be adjudged to pay him the amount of taxes paid, penalties and interest; only the one trial seems to be contemplated. The evidence in the possessory action, so far as it may go, seems to have been intended to be sufficient to authorize a recovery of the taxes, though the deed, as a conveyance, should be void.

Plaintiffs' right to recover these taxes paid only arose upon his being defeated in his action to recover the land, and, therefore, the statutes of limitation did not commence to run against this claim, and have no application to it independent of his right of action to recover the land. If it had been shown that defendant and those under whom he claimed had been in the actual possession of the land for ten years consecutively between the date of the tax deed and the commencement of this suit, a different question would arise.

The plaintiffs should have had judgment for taxes paid, penalties and interest, as provided by section 219. If the taxes on the tract in question are included in that of the larger tract sold, the judgment should only be for its proper proportion of tax.

Judgment reversed and cause remanded, and the circuit court is directed to enter judgment for plaintiff in accordance with this decision. All concur.

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Oates v. The Union Pac. Ry. Co.

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OATES, *Appellant*, v. THE UNION PACIFIC RAILWAY
COMPANY.

DIVISION ONE.

1. **Negligence: DEATH: EXTRA TERRITORIAL FORCE OF STATUTE.** A resident of Missouri was killed in Kansas by the negligent acts of a railroad company, in whose service he was engaged, under such circumstances as would have entitled his widow to recover under the second section of our damage act, if the accident had occurred in Missouri. The Kansas statute provides that "when the death of one is caused by the wrongful act or omission of another the personal representatives of the former may maintain an action therefor. * * * The damages cannot exceed \$10,000 and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." *Held* that the widow could not recover in an action in Missouri though no administrator could be appointed in Kansas, because the deceased left no estate there, and though the action could be brought in either state by an administrator appointed in Missouri.
2. **Parties: CAUSE OF ACTION: STATUTE.** Where a statute gives the cause of action and designates the persons who may sue, they alone can sue and must do so within the time prescribed by the statute.

Appeal from Jackson Circuit Court.—HON. J. H.
SLOVER, Judge.

AFFIRMED.

Sherry & Hughes for appellant.

The court erred in sustaining defendant's demurrer to plaintiff's petition, and the appellant cites the following authorities, to-wit: *Dennick v. Railroad*, 103 U. S. 11; *Knight v. Railroad*, 26 Am. & Eng. R. R. Cases, 485; *Leonard v. Nav. Co.*, 84 N. Y. 48; *Boyce v. Railroad*, 18 N. W. Rep. (Iowa) 673; *Morris v. Railroad*, 23 N. W. Rep. (Iowa) 143; *Railroad v.*

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Lewis, 40 N. W. Rep. (Neb.) 401; *Stoeckman v. Railroad*, 15 Mo. App. 503; Cooley on Torts [2 Ed.] 266; *Debevoise v. Railroad*, 98 N. Y. 379; *Railroad v. Doyle*, 60 Miss. 977; *Burns v. Railroad*, 113 Ind. 169; *Herrick v. Railroad*, 31 Minn. 11; *Scott v. Lord Seymour*, 1 Hurl & C. 219; *Bruce v. Railroad*, 83 Ky. 174.

John W. Beebe for respondent.

(1) The court did not err in sustaining the demurrer. *First*. The petition on its face shows that the plaintiff had no cause of action, and especially so, as the only person having a cause of action at the time this suit was instituted was the personal representative, *i. e.*, executor or administrator, of the deceased, and this is disclosed by the petition itself. 3 Wood, *Railroad Law*, sec. 413; *City of Atchison v. Twine*, 9 Kan. 350; *Limkiller v. Railroad*, 33 Kan. 83; *Barker v. Railroad*, 91 Mo. 86; *Vawter v. Railroad*, 84 Mo. 679; Shearman & Redfield on Negligence [4 Ed.] sec. 133. *Second*. The cause of action having arisen under the laws of Kansas could not, under any circumstances, be enforced in this state, as the statutes of Kansas and Missouri on the subject are essentially different. *McCarthy v. Railroad*, 18 Kan. 46; *Railroad v. Lacy*, 43 Ga. 461; *Willis v. Railroad*, 61 Tex. 432; *Ash v. Railroad*, 19 Atl. Rep. 643; *Davis v. Railroad*, 143 Mass. 301; *Vawter v. Railroad*, 84 Mo. 679; Rorer on Inter-State Law, secs. 158-163.

BLACK, J.—The petition discloses these facts: The defendant, the Union Pacific Railway Company, owns and operates a railroad in the state of Kansas, which extends into this state. The defendant's servants carelessly and negligently ran a train of cars upon J. M. Oates at a point in the state of Kansas, inflicting injuries upon him from which he died the next day, namely, June 9, 1885. Oates was not in the employ of the defendant at the time he was injured, but he was in the

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employ of another railroad company. At and prior to his death he resided in this state, and he left surviving a widow and three minor children. Plaintiff, who is the widow of deceased, brought this suit in the courts of this state for the death of her husband, laying her damages at the sum of \$10,000, and founding her cause of action upon the statute laws of the state of Kansas, which are set out in the petition.

The circuit court sustained a demurrer to the petition, and the sole question before us is, whether the plaintiff can maintain this suit in the courts of this state.

As the plaintiff founds her cause of action upon the statute law of the state of Kansas, and she is also forced to rely somewhat upon the statute laws of this state, we shall first set out, in words or substance, the statute laws of the two states.

The statute of the state of Kansas, set out in the petition, is in these words: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he lived, against the latter for the same act or omission. The action must be commenced within two years. The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." It is conceded that the words, "personal representatives," mean the executor or administrator, and that under the rulings of the supreme court of Kansas the suit cannot be maintained by the widow and children, or by either, but must be brought by the executor or administrator, he to make distribution to the widow and children, or next of kin.

Had Oates received the injuries causing his death in this state, then, under the circumstances set out in the petition, the cause of action would come under the

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second section of our damage act, which fixes the amount of the forfeiture or damage at the sum of \$5,000 to "be sued for and recovered, *first*, by the husband or wife of deceased; or, *second*, if there be no husband or wife, or he or she fails to sue within six months after such death, by the minor child or children of the deceased; or, *third*, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor."

We have pressed upon our attention in this case, as we did in the case of *Vawter v. Railroad*, 84 Mo. 679, a class of cases to the general effect that a right of action created by the statute of one state may be prosecuted in another state, where the two states have statutes relating to the same subject which are alike or similar in substance and effect. We were of the opinion that these cases then cited did not rule that case, and we are of the opinion they have little or no application to the case in hand. In that case the plaintiff was the administrator of the estate of the person who died from injuries received in the state of Kansas. The plaintiff received her appointment as administratrix in this state, and then commenced suit in this state, founding her cause of action upon the before-quoted statute of the state of Kansas. Having been appointed administratrix in this state, she, of course, possessed the powers and the powers only conferred upon her by the laws of this state. The laws of this state gave her no authority to prosecute such a suit. They not only gave her no such authority, but they denied an executor or administrator the right to prosecute an action on the case for injuries to the person of the testator or intestate. R. S. 1879, secs. 96, 97. We, therefore, held that the administratrix could not maintain the action, and from that ruling we make no departure. The conclusion reached in that case has the support, not only of the cases there cited, but also of the court of appeals of Maryland, in

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Ash v. Railroad, 19 Atl. Rep. 643. The *Vawter* case is, of course, not decisive of this one; for here the suit is brought by the widow, not by an administrator having no power to prosecute such a suit.

As we have said, the plaintiff founds her cause of action upon the statute of the state of Kansas. According to that statute, the cause of action accrued to the executor or administrator of the deceased person. It is true the damages, not to exceed \$10,000, inure to the benefit of the widow and children, or next of kin, to be distributed in the same manner as personal property of the deceased is distributed in that state. But the executor or administrator is the only person who can sue for and recover the damages. The plaintiff in this case could not maintain the suit in that state. Though the cause of action is based upon a statute of that state, and though the present plaintiff could not prosecute the suit in that state, yet we are asked to say she may prosecute it in this state. This we cannot do. Says Mr. Wood: It is needless to say that actions under these statutes must be brought by the persons designated therein, and within the time and in the manner therein provided. If the statute provides that the action shall be brought by the executor or administrator of the deceased, *no other person can maintain an action.*" 3 Wood's Railway Law, sec. 413. The statute gives the cause of action and points out the persons who may sue, and they, and they alone, can sue, and they must sue within the time prescribed by the statute. *Barker v. Railroad*, 91 Mo. 86. The fact that by the statute of this state the widow, under the circumstances detailed in the petition, could sue for and recover the fixed sum of \$5,000, does not aid the plaintiff, for our statute has no extra territorial operation. As the plaintiff could not prosecute this suit in that state, she cannot prosecute it in this state. This we think too clear to admit of any doubt. If, by the laws of that state she could prosecute the suit, then

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a different question would be presented for our consideration.

On behalf of the plaintiff, it was argued at the bar of this court, that an administrator appointed in this state cannot prosecute this suit in the courts of Kansas, and so it has been held in *Limekiller v. Railroad*, 33 Kansas, 83; that no administration can be granted upon the estate of the deceased in the state of Kansas, because he had no property in that state; that plaintiff cannot maintain this suit in that state; and that she is, therefore, without remedy, unless she is allowed to prosecute the present action in her own name in this state. The answer to all this is, that any omission in the statute laws of the two states must be supplied by the legislatures thereof. While it is suggested there has been some such legislation of late, it is not claimed that it can or does affect this suit. The judgment is, therefore, affirmed. All concur.

 LYNCH V. DONNELL, *Appellant*.*

 DIVISION ONE.

1. **Tax Sales: NOTICE: CITY CHARTER.** Where a city charter requires the collector to post written notices of tax sales, he may do so by his deputy.
2. ——— : ——— : ———. The certificate of the collector need not show that the notice of sale remained posted up for three weeks, under a provision of the charter requiring the collector to file with the auditor a certificate that the notice "had been posted in the four most public places in the city, at least three weeks before the sale."

* The cases of *Long v. Donnell* and *Long v. Young* were by agreement reversed and bills dismissed, upon the authority of the above entitled cause.

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123	538
104	519
147	645
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3. — : — : —. The "four most public places in the city," at which the notices were required to be published, were matters for the judgment of the collector, and this is true, although the city council had passed an ordinance on the subject.
4. — : ADJOURNMENT: THANKSGIVING DAY. A provision in the city charter directing the collector "to continue the sale from day to day between the hours of ten o'clock and five o'clock in the afternoon, as long as there are bidders, or until the taxes are paid," does not prevent the collector from adjourning the sale over Thanksgiving day.

Appeal from Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED.

W. C. Stewart for appellant.

(1) The court erred in holding that the notice of sale was not duly and legally given. (2) The court erred in holding that the collector did not file in the office of the city auditor a copy of the notice of sale with his certificate indorsed thereon, setting forth that notice had been posted up in the four most public places in the City of Kansas, at least three weeks before the day of sale. (3) The court erred in holding that the collector did not hold the sale from day to day from the first day, November 6, to and including the eighth day of December, 1882, the day of the sale of the property in question. (4) The court erred in concluding that the collector omitted to hold the sale on the thirtieth day of November, 1882, and that said day was Thanksgiving day, and that such omission deprived him of the power to make any sale thereafter. (5) The court erred in finding the issues for the respondent when they should have been found for the appellant.

C. O. Tichenor for respondent.

(1) The evidence shows that the notices were not posted in the "four most public places in the city."

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Ruly v. Huntsman, 34 Mo. 501. (2) The places were not selected by the collector, but by the common council. This was a duty which neither the collector could delegate nor the council usurp. *Langdon v. Poor*, 20 Vt. 13; *Powers' Appeal*, 29 Mich. 508. (3) The certificate of the collector was insufficient, for it referred to the single act "of posting up." It should show that the notices continued up for three weeks. *Tidd v. Smith*, 3 N. H. 178; *Bussey v. Leavitt*, 12 Me. 378; *Pennell v. Morrow*, 30 Ark. 661; *Abbott v. Doling*, 49 Mo. 304; *Spurlock v. Dougherty*, 81 Mo. 182; Cooley on Taxation [1 Ed.] 334; *Ramsay v. Howard*, 68 Wis. 12; *Morris v. Carmichael*, 68 Wis. 133; *Yankee v. Thompson*, 51 Mo. 239; *Moore v. Harris*, 91 Mo. 611; *Spurlock v. Allen*, 49 Mo. 180; *Nelson v. Pierce*, 6 N. H. 194. (4) Plaintiff has shown that the posting was not as required by the charter. He need not have done so, as the certificate was defective. Being defective, it was "past all surgery." There would be no safety as to titles if this were not so. The record must show what was done. It cannot be corrected or changed. *Duff v. Nelson*, 90 Mo. 97; *Iverslie v. Spaulding*, 32 Wis. 394; *Lessee v. McLaughlin*, 8 Ohio, 114; *Jarvis v. Silliman*, 21 Wis. 600; *People v. Commissioners*, 14 Mich. 531. (5) The collector could not, under the charter, adjourn the sale over Thanksgiving day. *Sullivan v. Donnell*, 90 Mo. 283; *State v. Ambbs*, 20 Mo. 216; *Moore v. Hagan*, 2 Duval, 439.

BRACE, J.—This is an action to set aside a tax deed from the city collector of Kansas City to the defendant for a lot in said city, as being a cloud upon plaintiff's title thereto. The court found for the plaintiff, and the defendant appeals from the judgment rendered on such finding.

The plaintiff concedes that the tax deed is valid upon its face, but claims that the tax sale is void for the following reasons: "*First*. The notices of sale

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were not posted up in the four most public places in Kansas City. *Second.* The places were not selected by the collector, but by the council. *Third.* The notices were not posted by the collector. *Fourth.* The certificate and affidavit in reference to said notice were prematurely made and filed, and the certificate is not in the form required by the charter. *Fifth.* The sale was not continued from day to day. No sale having been made on Thursday, November 30, because it was Thanksgiving day."

The charter provisions by which the questions raised must be ruled are as follows (Session Acts, 1875, art. 6, pp. 231, 232):

"Sec. 43. The notice to be given of the sale of real property for delinquent taxes shall state the time and place thereof, and contain a description substantially the same as in the land tax book, of the several parcels of real property to be sold, and all delinquent taxes and assessments thereon, and such real property as has not been advertised and sold for the taxes of any previous year or years, and on which taxes or special assessments remain due and delinquent, and the amount of the taxes and special assessments, interests and cost against each parcel of real property.

"Sec. 44. The city collector shall give the notice required in the last preceding section, by causing the same to be published once in each week for three successive weeks, in some newspaper published in the City of Kansas, the last publication to be at least one day before the day of sale. The city collector shall charge and collect, in addition to the taxes and interest, a sum not exceeding ten cents, on each tract of real property advertised for sale, or any sum not exceeding said amount, as may be provided by ordinance of the City of Kansas. And if the city collector cannot procure the publication of said notice for the sum herein specified, or as may be provided by ordinance as aforesaid, or if from any reason the city collector is unable to

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procure the publication of said notice, he shall post up written notices of said sale in the four most public places in the City of Kansas, at least three weeks before (the) sale; and notice so given shall have the same force and effect as though the same had been published in a newspaper. In that case he shall, before making the sale, file in the office of the city auditor a copy of said notice, with his certificate indorsed thereon, setting forth that said notice had been posted up in the four most public places in the City of Kansas, at least three weeks before the sale, which said certificate shall be subscribed by him and sworn to before some person authorized to administer oaths. The city collector shall obtain a copy of said advertisement, together with a certificate of the due publication thereof, from the printer or publisher, or business manager of the newspaper in which the same shall have been published, and shall file the same in the office of the city auditor, and such certificate shall be substantially in the form that may be prescribed by ordinance of the City of Kansas, or by the comptroller.

“Sec. 45. The city collector shall, at his office in the City of Kansas, on the day of sale, at the hour of ten o'clock in the forenoon, offer for sale, separately, each tract or parcel of real property advertised for sale, on which the taxes, interest and costs, or special assessments have not been paid, and shall continue the sale from day to day, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon, as long as there are bidders, or until the taxes are all paid.”

By an ordinance of the city approved, August 21, 1877, it was ordained:

“Sec. 1. That the charges allowed for publishing the notice to be given by the city collector of the sale of real estate for delinquent taxes as is prescribed by sections 43 and 44 of article 6 of the charter shall not exceed ten cents on each tract of real property advertised for sale, for the entire years of delinquency.

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"Sec. 2. In case the city collector cannot procure the publication of said notice by any newspaper published in the City of Kansas he shall put up written notices of said sale in the four most public places in the City of Kansas at least three weeks before the sale and the common council hereby determine that the four most public places in the city of Kansas are; to-wit: The old city courthouse on the corner of Fourth and Main street; the postoffice corner of Main and Seventh street; at number 1433, Grand Avenue, near the northeast corner of Grand Avenue and Fifteenth street; one, the Leland Hotel, Union Avenue, West Kansas City.
* * *"

On the fourteenth of October, 1882, the collector filed in the office of the city auditor a copy of the notice of sale for delinquent taxes given in this case, said notice conforming to the requirements of section 43 of the charter together with his certificate thereon, setting forth that being unable to procure the publication of said notice in any newspaper published in the City of Kansas for a sum not exceeding ten cents per tract, that he posted up written notices of the sale of which the one filed is a true copy "in the four most public places in the City of Kansas at least three weeks before the sale and before the first Monday of November, A. D. 1882, which public places were and are the following," naming the same places specified in the ordinance.

By the notice the sales were to begin on the first Monday in November, and the sale of the lot in question was made on the eighth of December, 1882.

I. It will be observed that section 44 makes it the duty of the city collector to give the notice required by section 43 of the sale of real property for delinquent taxes. There is nothing in the terms of the law implying that the mere physical act of posting up the notices must be performed in person by the collector; there is nothing in the nature of the act to be performed requiring skill or which could be supposed to involve the idea

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of personal or official trust or confidence; that they were put up as stated in the certificate; and that the collector caused them to be put up by his deputy employed for that purpose is not questioned, and it cannot be seen why the maxim *qui facit per alium, facit per se* should not apply to this point.

II. There can be no question that under the charter it was the privilege of the collector to select the four most public places at which the notices were to be posted, and that he could not be and was not deprived of that power by the ordinance cited. His certificate shows that *he* posted them at the places therein mentioned; the oral evidence that he caused them to be so posted; these places were selected by him as the four most public places. The fact that such an ordinance had been passed may and doubtless did have its influence in leading him to the conclusion that the places selected were the four most public places; so may have other considerations and suggestions; nevertheless, he selected these places, caused the notices to be placed there, and so returned the fact in his certificate. The important inquiry is, were such the places contemplated in the charters? It is the act of the collector, the time and manner in which he did it, that affects the interest of the delinquent owner, not the considerations which led him to the conclusion to so do it.

III. In answer to the fourth point of counsel it may be first said that the charter does not prescribe a form in which the certificate of the collector is required to be made, and no ordinance was introduced prescribing such form. The only provision in regard to the time when it shall be filed is that it must be filed before making the sale. The certificate was filed on the fourteenth of October, 1882; the sale commenced on the sixth of November thereafter, and complied with the law in this particular, by not only showing that the certificate was filed before the sale, but that the notices

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were posted at least three weeks before the sale. Section 44, *supra*, prescribes what the certificate shall contain, *i. e.*, it must set forth, that the written notice required by that section "*had been posted up* in the four most public places in the City of Kansas at least three weeks before the sale," and the real point of contention as developed in the argument of counsel seems to be that this requirement is not met by the certificate filed in this instance in which the collector says he *posted up* the written notice of the sale in the four most public places in the City of Kansas at least three weeks before the sale.

Counsel for plaintiff contend that by the form of expression used in the charter the collector is required to certify in effect not only that he posted up the notices three weeks before the sale, but that such notices remained so posted up during the whole of that period of time; if the law does in effect require such a certificate, then of course it was the duty of the collector after putting up the notices to maintain them posted for three weeks in order that he might truthfully so certify. Color for such a construction can only be found by wrenching from its connection that part of section 44 treating of the certificate, and treating it as a separate and independent provision. That the law does not require a certificate expressive of this idea is obvious when that part of section 44 is read in connection with the preceding part of the same paragraph prescribing the duty of the collector in regard to posting notice.

He is first required, in the contingency therein stated, to "post up written notices of said sale in the four most public places in the City of Kansas at least three weeks before the sale," and this is the whole of his duty in this behalf; having performed that duty he is then in the next sentence required to certify that he had performed that duty, *i. e.*, that the notices had been posted up as required; having discharged his whole duty by

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posting them, a construction that would require a certificate that he did something more, something that the law did not require him to do, must be faulty. Such a construction is unreasonable from other considerations; in order that he might make such a certificate truthfully and conscientiously, he would have to keep ward and watch over these notices continuously from the time they were posted during the entire period of three weeks. The law makes no such unreasonable requirement; there is no necessity for it; when the notices are once posted, provision is made by the penal laws of the state for their protection, and for keeping them posted intact. R. S. 1879, sec. 1583.

IV. To sustain the first point made against the sale, the plaintiff introduced the evidence of two witnesses tending to prove that certain other places in Kansas City were more public than "1433 Grand Avenue near the northeast corner of Grand Avenue and Fifteenth street," where one of the notices of sale was posted, and counsel contend that, in posting one of the notices at that point, the collector failed to comply with that provision of the charter requiring him to "post up written notices of said sale in the four most public places in the City of Kansas." No question is raised as to the three other places. The points designated by these witnesses are in the immediate vicinity of either one or the other of two of the places (the old courthouse and postoffice) at which notices were posted. The phraseology of the charter, in this regard, is a little peculiar; "four of the most public places" is the form most commonly used in these enactments. The meaning and purpose is, however, the same; the object of all these enactments is to give notice to as many people as possible who may be interested in such sale, either as owners, taxpayers or possible purchasers.

The people to be reached by these notices were distributed all over the city, in its suburbs and in the surrounding country. Kansas City, in 1882, like most other

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growing western cities, it seems, was not a compact mass having a common social and business center, to which all of its citizens habitually resorted, but consisted rather of a number of associated communities, each having in itself, to some extent, a separate social and business life. The evidence shows that the neighborhood around 1433 Grand Avenue was an important and populous one of these divisions having such a separate life. It is not disputed that the point at which the notice in question was posted was the most public in that part of the city. The law provided for only four notices with which to notify the whole city. Two were posted in the neighborhood of, and in convenient proximity to, the places named by the witnesses; to post another at one of the places named by the witnesses would have been to merely duplicate the notice for those citizens residing or doing business in, or resorting to, that part of the city, and to deprive a large number of citizens, residing and doing business in another part of the city, of convenient access to such notice. This, while it might be a compliance with the letter, would be to ignore the spirit, and defeat the very object sought to be accomplished by the law.

The law left the selection of the four most public places, at which the notices are to be posted, to the judgment of the collector. He has, in this instance, exercised it wisely, in accordance with the true spirit and meaning of the law, and in a manner best calculated to secure its object; this becomes more palpable when it is remembered that, by the ordinance before referred to (published five years before) the places where the four notices were posted were the places designated as the most public, and that it had been the custom in previous years to post the notices at these places; hence, they were posted at the very places where the citizens generally would expect to find them. To make a change, under such circumstances, would be a matter for grave consideration, and

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ought to have had the support of good cause. Although the ordinance was not binding on the collector, its observance, until it became custom, was a fact not to be disregarded in determining the four most public places for such notices.

V. The plaintiff introduced evidence tending to prove that no sales were made on the thirtieth of November, 1882, which was Thanksgiving day, and contend that the sale made to defendant on the eighth of December, following, and the deed executed in pursuance thereof are void for that reason; because, after commencing the sale in conformity to law and the notices given, the charter requires that he "shall continue the sale from day to day between the hours of ten o'clock in the forenoon and five o'clock in the afternoon as long as there are bidders, or until the taxes are all paid." Sec. 45, *supra*. This is a direction to the collector. The expression "from day to day" in this clause of the section cannot be construed that he must in all instances continue the sale from a day precedent to the next succeeding day; if so, to comply with its terms would require sales to be made on Sunday, a construction that no one would contend for. Tax laws, like all other laws, are to be construed reasonably and with reference to the usages and customs of the country and the general law of the land. For nearly thirty years Thanksgiving day, as proclaimed by the governor, has been observed as a holiday by the people of the state; so firmly had its observance become imbedded in the customs of our people that it was finally declared by statute to be a public holiday. R. S. 1879, sec. 551.

And, that its character as such might not be mistaken, the same section provided, that for all purposes whatever as regards the presentment for payment or acceptance, and of presenting and giving notice of dishonor of commercial paper, such holiday "shall be treated and considered the same as the first day of the week commonly called Sunday," and the legislature

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emphasized their appreciation of its character by enacting at the same session a law providing that no person on Sunday or any Thanksgiving day "shall serve or execute any writ, process or warrant, order or judgment, except in criminal cases, or for a breach of the peace." R. S. 1879, sec. 4039.

As in the case of Sunday it is confessedly within the power of the collector under the expression "from day to day" to continue the sale from a day to the second day thereafter, and, in view of the fact that Thanksgiving day is by the custom of the country observed as a day when the citizen is expected to rest from his usual vocation, cease buying, selling and exchanging, and turn to thoughts of gratitude to his Creator and benevolence toward his fellow man; and as, by the law of the state, the day is put upon the same plane with Sunday in regard to the execution of its process, we have no doubt, giving the phrase "from day to day" its usual and ordinary meaning when used in regard to the transaction of matters of business, and the holding of public sales, that it was not only within the power of the collector to continue the sale from the day before to the next day after Thanksgiving, but that in doing so he exercised a wise discretion, if in fact it was not his duty to do so.

The plaintiff having failed to prove that the law had not been complied with in respect of any of the matters complained of, the defendant's deed, conceded to be valid upon its face, should not have been set aside. The judgment is, therefore, reversed, and the bill dismissed. All concur.

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Appellant.

DIVISION TWO.

1. **Corporation: POWERS OF PRESIDENT: CONTRACTS BY.** The president of a corporation being its chief executive officer may, without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business.
2. ——— : ——— : **NOTE.** The corporation *held* liable in this case on negotiable notes executed in its name by the president for the purchase price of mules.
3. ——— : **NEGOTIABLE NOTE: EXTRINSIC EVIDENCE.** Where, however, negotiable notes are signed by the president of a corporation in his own name, and nothing appears on the instrument to indicate he was acting as agent of the corporation, extrinsic evidence is inadmissible to show such agency.
4. **Contract: PERSON USING ANOTHER NAME: ESTOPPEL.** A party may bind himself by another than his true name, where he executes an instrument with the intent to so bind himself, or where he uses a name by which he is shown to have held himself out to the world and carried on business.
5. **Practice: INSTRUCTIONS.** Instructions are properly refused when they do not conform to the pleadings and evidence in the case.

Appeal from Jackson Circuit Court.—HON. J. H. SLOVER, Judge.

REVERSED.

THIS is an action on five negotiable promissory notes, alleged to have been executed by defendant by and through one Stewart Jackson. The plaintiffs were copartners, engaged in the horse and mule business in Kansas City, and had been for two years prior to the making of the notes sued on. The defendant was a business corporation, organized under the laws of this state, and doing transfer business in Kansas City. On the twenty-first day of June, 1887, one Stewart Jackson,

104	531
112	24
104	531
113	107
54a	415
54a	658
104	531
130	460
64a	35
104	531
139	23
71a	109
72a	519
104	531
143	30
104	531
77a	432
179a	358
104	531
81a	418
104	531
87a	601
104	531
88a	65
104	531
167	424

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in payment for certain mules by him bought of plaintiffs that day, gave plaintiffs the following note :

"\$1,860. KANSAS CITY, Mo., June 21, 1887.

"Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock \$1,860, for value received, at the banking office of H. S. Mills, in Kansas City, Missouri, with interest from date at the rate of ten per cent. per annum until paid, and, if interest be not paid annually, to become as principal, and bear the same rate of interest.

"Due August 20, 1887.

"DISPATCH TRANSFER CO.

"By S. JACKSON, President."

And on July 5, 1887, said Jackson, in payment of mules that day bought of plaintiffs, gave plaintiffs the following note:

"\$1,840. KANSAS CITY, Mo., July 5, 1887.

"Thirty days after date we promise to pay to the order of Sparks Bros. and Hancock \$1,840, for value received, at the banking office of H. S. Mills & Son, in Kansas City, Missouri, with interest from date at the rate of ten per cent. per annum until paid, and, if interest be not paid annually, to become as principal, and bear the same rate of interest.

"Due August 5, 1887.

"DISPATCH TRANSFER CO.

"By S. JACKSON, President.

"Indorsed: Protest waived.

"S. JACKSON."

On the eleventh of June, 1887, said Jackson, for mules bought by him of plaintiffs, gave them this note:

"\$300. KANSAS CITY, Mo., June 11, 1887.

"Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock \$300, with ten-per-cent. interest from date, value received.

"Due August 10, 1887.

S. JACKSON."

On June 11, said Jackson, for mules by him bought that day of plaintiffs, gave this note

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"\$375. KANSAS CITY, Mo., June 11, 1887.

"Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock \$375, with ten-per-cent. interest from date, value received.

"S. JACKSON."

And on June 15, this note:

"\$240. KANSAS CITY, Mo., June 15, 1887.

"Sixty days after date I promise to pay to the order of Sparks Bros. and Hancock \$240, for one mouse-colored mule bought of C. Sparks, with ten-per-cent. interest from date, value received.

"Due August 14, 1887. S. JACKSON."

The plaintiffs declare upon each note separately, and charge that the defendant executed all five of the notes, by its president, Stewart Jackson. There is also a sixth count, which is as follows: "*Sixth.* Plaintiffs, for another cause of action, state that between the tenth day of June, 1887, and the sixteenth day of June, 1887, plaintiffs, at the request of defendant, sold and delivered to the defendant certain mules as follows, to-wit: On the eleventh day of June three (3) mules, for \$675; on the fifteenth day of June, 1887, one (1) mule, for \$240; amounting in all to the sum of \$915; which said sum defendant owes plaintiffs, and fails and refuses to pay the same, although payment has been demanded; wherefore plaintiffs demand judgment against defendant for the sum of \$915, and for costs."

The defendant, for its defense, denies that it executed either of said notes; denies that it ever authorized the execution of either of said notes; alleges that said notes were given to plaintiffs by said Jackson on his own private account, and that the consideration therefor was certain mules and horses sold by plaintiff to Jackson for his individual account, and in no way connected with defendant's business; that said mules and horses were never delivered to defendant, and were never bought by or for defendant; that Jackson was carrying on a general business buying and selling horses

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and mules for his own account, which plaintiffs well knew; and that the horses and mules for which these notes were given were bought by said Jackson in the ordinary course of his business, and plaintiffs knew he did not buy said mules and horses for defendant. Defendant set up its charter, showing that, by it, it was only authorized to conduct a general transfer business in the City of Kansas, moving freight from point to point in said city; that it was never engaged in the business of buying or selling horses or mules, nor authorized anyone to do so for it; that said two notes were wrongfully executed in its name by Jackson; that it had no power to engage in the horse and mule business, and the notes and the trades for said mules were *ultra vires*.

Also, pleaded especially that by one of its by-laws it was provided: "No debt for a sum larger than \$500 shall be contracted in behalf of the company by any officer thereof, without a vote of the board of directors authorizing same;" that the debt sued for in the first and second and sixth counts exceeded \$500; that said mules were not bought for the defendant by said Jackson in the usual routine of business; that they were not needed by defendant for its business; that they were not desired; that defendant knew nothing of their purchase, and its board of directors never authorized their purchase, nor the contracting of the debt therefor. This answer was verified by Harry E. Overstreet, secretary and treasurer. The reply was a general denial. The cause was tried by a jury, and resulted in favor of plaintiffs on each count except the sixth.

The facts developed by the evidence are as follows: The defendant was a corporation engaged in the transfer business in Kansas City. Stewart Jackson was the president of the company. The company, as originally organized, had a capital of \$10,000,—one hundred shares. Jackson had the controlling interest,—fifty-five shares.

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Afterwards the stock was increased to \$30,000, of which Jackson had one hundred and sixty shares,—a majority of all the stock. Jackson was the president from the beginning until he left in August, 1887, after the execution of the notes sued on. It also appears that Jackson purchased every mule and horse that defendant ever owned until he absconded; that defendant's business required mules to haul the freight it handled; that, beginning with November, 1885, and ending May 31, 1887, defendants had some thirteen different transactions in mules with plaintiffs or the firm which plaintiffs succeeded, aggregating some \$3,000; that in a number of these transactions the defendant gave its note in its name, by Jackson who conducted all the trades. There was also evidence that the mules were all turned over to defendant's barns. Defendant offered evidence that it did not get the mules; that, although brought to its barns, they were taken out by Jackson, and shipped to St. Louis; that Jackson bought the mules on his own account, and that plaintiffs knew it. Plaintiffs offered evidence that they thought, and were informed, that the mules were bought by Jackson for the defendant; that when Jackson gave the three notes sued on in counts 3, 4 and 5, they directed him to give the company's notes to the clerk of plaintiffs in their counting-room, and did not know, till after Jackson had absconded, the notes simply bore his name; that they were selling the stock to defendant.

On the trial defendant objected to the introduction of the three notes sued on in the third, fourth and fifth counts, for the reason that they were incompetent, irrelevant and immaterial, as they were the individual notes of S. Jackson alone; that defendant was not and could not be bound thereby. The court gave nine instructions for the plaintiffs, in which the liability of defendant for the acts of Stewart Jackson, done in its name, was correctly defined.

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The eighth instruction is as follows: "8. As to those notes here sued on, executed in the name of S. Jackson, the jury will ascertain whether these were executed for and in behalf of the company; and, if you find that they were so executed, then as to these the defendant is liable thereon to the same extent as if said notes had been executed in the name of the company."

For the defendant the court gave twenty-two instructions, fully submitting all the issues tendered in its answer, that the mules were purchased by Jackson on his individual account; that plaintiffs knew it, and whether the purchases were *ultra vires*. The court refused the twenty-third instruction, which is as follows: "23. The jury are further instructed that, even if they should believe from the evidence that at the time of the execution of the notes in controversy, and signed in the name of the defendant company, plaintiffs in good faith believed they were dealing with defendant's company, and yet, while the mules, which in return for said notes they delivered to S. Jackson, remained in his possession, and the plaintiffs knew of their whereabouts before disposed of by said Jackson, plaintiffs or their authorized representatives became aware, or had reason to know, that said Jackson deceived them, and misrepresented to them that said mules were for defendant company, and, notwithstanding such knowledge, made no effort to recover their said mules, but suffered said Jackson to proceed and dispose of the same, then they cannot recover from defendant company; and in determining these questions the jury should determine from the evidence whether said mules were shipped by said S. Jackson to St. Louis, and whether Charlie Sparks was the authorized representative of plaintiffs, and whether he was present at the time of said shipment, or knew of the same in time to have notified plaintiffs and effected a recovery of the mules before they were finally disposed of by said Jackson, if you believe he did dispose of them"

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The jury returned the following verdict :

"We, the jury, find for the plaintiffs on the first five counts of the petition as follows: First count, principal and interest, \$1,937.50; second count, principal and interest, \$1,909.49; third count, principal and interest, \$313.33½; fourth count, principal and interest, \$391.66½; fifth count, principal and interest, \$250.40. We also find for defendant on the sixth count of the petition.

JOHN J. GRANFIELD,

"Foreman."

Lathrop, Smith & Morrow for appellant.

(1) The demurrer to the evidence should have been sustained. (2) The defendant corporation had not itself the power to buy the mules for the purposes for which they were bought. R. S. 1879, art. 8, chap. 21; R. S. 1879, sec. 706; R. S. 1889, sec. 2508; 6 Am. & Eng. Corp. Cases, 261. Defendant not having the power to engage in the transaction in question, it could not confer such power on Jackson. *Burtis v. Railroad*, 24 N. Y. 281; *Matthews v. Skinker*, 62 Mo. 333. (3) "An agent authorized to draw or indorse bills in the name of his principal has no power to draw or indorse a bill in his own name, or in the joint name of himself and principal." *Bank v. Gay*, 63 Mo. 38; *Slainback v. Read*, 11 Gratt. 281. "Though the rule of law as to simple contracts in writing other than bills and notes is, that parol evidence is admissible to charge unnamed principals, * * * yet it is conceived that the law as to negotiable instruments is different in one respect, to-wit, that when the principal's name does not appear he is not liable on a bill or note as a party to the instrument." Dicey on Parties to Actions [2 Am. Ed.] pp. 270 and 271; Byles on Bills [8 Ed.] pp. 34 and 35; *Pentz v. Stanton*, 10 Wend. 276; *Leadbitter v. Farrow*, 5 M. & S. 349; *Bult v. Morrell*, 12 A. D. & E. 751; *Bradlee v. Glass Co.*, 16 Pick. 350; *Bank v. Hooper*, 5 Gray, 567;

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Anderson v. Shoup, 17 Ohio St. 125; *Lander v. Castro*, 43 Cal. 497. (4) A note signed A. C., agent, binds A. C. only, though his employers had previously assumed similarly signed notes. *Williams v. Robbins*, 16 Gray, 89; *Dubois v. Canal Co.*, 4 Wend. 288; *Woodbury v. Blair*, 18 Iowa, 572; *Bickford v. Bank*, 42 Ill. 238; *Rand v. Hale*, 3 W. Va. 495.

Peak, Yeager & Ball for respondents.

(1) Plaintiffs were only chargeable with constructive knowledge of the charter powers of the defendant, which had the authority to purchase stock through its accredited officer and president, who was the head and front of the organization. *Railroad v. Saving Society*, 24 Ind. 461; *Bank v. Bank*, 16 N. Y. 125. (2) From the previous course of dealing of defendant with plaintiffs; from the powers which defendant at all times allowed Jackson to exercise without let or hindrance, and from the powers which he actually possessed to purchase stock for defendant, plaintiffs were warranted in relying upon his representations in selling and delivering the stock in question, and the defendant is bound by those representations. *Bank v. Coal Co.*, 86 Mo. 125; *Bank v. Bank*, 7 Atl. Rep. (N. J.) 318; *Edwards v. Thomas*, 66 Mo. 468 (486). (3) Plaintiffs were not chargeable with knowledge of any secret criminal purpose on Jackson's part at the time he made these purchases (of which there is no evidence) to steal a part of these mules after they were sold and delivered to defendant; and if he appropriated part, or all of them, the defendant is nevertheless liable. The defense of *ultra vires* cannot avail. *Lumber Co. v. Bank*, 34 Kan. 635; s. c., 10 Am. Corporation Cases, 419; *Bank v. Globe Works*, 3 Am. Corp. Cases, 394; s. c., 101 Mass. 57. (4) If, therefore, the transactions in question had been the first that ever occurred between the parties, Jackson's authority *virtute officii* (to use the classic

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phrase of appellant's brief) would have been ample to bind defendant. *Ins. Co. v. Seminary*, 52 Mo. 480, and cases cited; *Ins. Co. v. White*, 10 Am. Corporation Cases, 191; s. c., 106 Ill. 97.

GANTT, P. J.—The notes sued on in this case were all executed by Stewart Jackson, who was at the time of their execution the president of the defendant below, appellant here. The first two were signed in the name of the Dispatch Transfer Company, by Jackson as president; the other three by Jackson, without any reference to the corporation, or any words indicating that he intended to bind anyone but himself. The appellant seeks to avoid liability for any of these notes, but its defense differs, as to the first two, from its defense to the remaining three. Counsel for appellant argues that the evidence did not justify the instructions given for respondents, by which appellant was held liable on the two notes signed with the corporate name. Those instructions, in substance, declared the law to be that, if the jury should find that Jackson was the president of the defendant, and that defendant allowed him to act as their purchasing agent in buying stock in the name of the company, and recognized his act as such by paying his orders given on the company, or by paying his notes given by him for stock so purchased by him of plaintiffs, then defendant was bound by his acts in purchasing the mules of plaintiffs, and for the notes sued on in the first two counts, unless plaintiffs knew, or had reasonable means of knowing, that Jackson was buying these mules on his individual account.

The power of Jackson to bind the defendant is governed by the law of agency. The principle underlying is the same whether the principal be a corporation or an individual. It is now well settled that, when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied

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from the manner in which he has been permitted by the directors to transact its business. This is only the application of the principle that usual employment is evidence of the powers of an agent, and the principal is held responsible for the acts of his agent within the apparent authority conferred on the agent. *First National Bank v. North Missouri, etc., Co.*, 86 Mo. 125; *Washington Mut. Fire Ins. Co. v. Seminary*, 52 Mo. 480; *Kiley v. Forsee*, 57 Mo. 390; *Martin v. Webb*, 110 U. S. 7; *Mining Co. v. Bank*, 104 U. S. 192. The president of a business corporation is its chief executive officer. He may, without any special authority from the board of directors, perform all acts of an ordinary nature, which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. Boone on Corp., sec. 144; *Stokes v. Pottery Co.*, 46 N. J. L. 237.

In the case at bar Stewart Jackson was president of defendant. He purchased every mule that defendant owned from its organization until after the execution of the notes sued on in this case. He had repeatedly signed notes in the name of the corporation, and the corporation had honored his orders and paid his notes so drawn. Plaintiffs had thirteen different transactions with him as the president and purchasing agent of the defendant prior to the giving of the notes herein, and his acts had always been ratified. The defendant was engaged in a transfer business in which the motive power was mules, and it was its written charter privilege to buy mules and execute its notes therefor. Jackson had purchased mules for the defendant of the plaintiffs; and on this occasion he informed them he was purchasing the mules, for which these two notes were given, for the defendant. His transaction, under the evidence, was within both his actual and apparent authority to bind the defendant. The evidence is amply sufficient to bind defendant on those two notes;

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and there was no error in the instructions given for plaintiffs on these two notes, and certainly defendant ought not be heard to complain.

The action of the court, in admitting parol evidence to show that the defendant was liable on the three notes sued on in third, fourth and fifth counts, notwithstanding its name nowhere appeared on the notes, and in instructing the jury as it did in the eighth instruction for the plaintiffs, presents for our consideration a question of great practical importance, and much depends upon its right decision. The exact question here presented has not been passed on by this court in any case that we have been able to find, but it has been long settled in many of our sister states. In Massachusetts as early as 1814, in the case of *Stackpole v. Arnold*, 11 Mass. 26, it was held that "where one makes a written contract, intending to act therein as the agent of another, and to bind his principal, it is necessary that it should appear in the *contract itself* that he acts as such agent;" and oral testimony was held inadmissible to contradict, vary or materially affect the written contract. The same question came before the same court again in 1863, in *Brown v. Parker*, 7 Allen, 337. In that case one N. H. Streeter had signed two negotiable notes, and it was sought to hold defendant Parker, on the ground that Streeter was his agent, and intended to bind defendant. The court says: "But, in suits on promissory notes or bills of exchange, no evidence is admissible to charge any person as principal *whose name* is not in some way disclosed on the face of the note or draft. This point has been often decided in this commonwealth, and the reasons on which the rule rests have been fully stated in very recent decisions," citing *Slawson v. Looring*, 5 Allen, 340, and cases cited, in which it was said by Chief Justice BIGELOW: "Being negotiable paper, all evidence *dehors* the draft is to be excluded. It is wholly immaterial, therefore, that the defendant was in fact the agent of the company named on the face of the draft;

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that the plaintiff knew that he was so, and that the defendant had no personal interest in the company."

In New York, in *Pentz v. Stanton*, 10 Wend. 271, the cases, both in England and in the different states of the Union, were reviewed, and the conclusion reached "that no person can be considered a party to a bill, unless his name, or the name of the firm of which he is a partner, appear on some part of it," citing *Chitty on Bills*, 22; *Fenn v. Harrison*, 3 T. R. 757; *Emly v. Lye*, 15 East. 6. And this rule is universally accepted as the law by the recent text-writers on commercial paper. *Tiedeman on Commercial Paper*, sec. 87; *Randolph on Commercial Paper*, sec. 131. "The reason of this rule is, that each party who takes a negotiable instrument makes his contracts with the parties who appear on its face to be bound for its payment. It is 'a courier without luggage,' whose countenance is its passport; and, in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal thereto, unless his name in some way is disclosed upon the instrument itself." 1 *Daniel on Negotiable Instruments*, sec. 303; *Mechem on Agency*, pp. 285-287; *Heaton v. Myers*, 4 Colo. 59. And another good reason for the rule is, that every part of commercial paper must be definite and certain and contained in the body of the paper itself, so that every taker and holder understands exactly what his rights in and to it are, and with whom he is contracting.

Counsel for respondents claim that this doctrine has been repudiated by this court in a number of decisions, and the importance of the question, and the earnestness with which this is urged, demand that we should state our reasons for declining to take that view of the case. The leading case relied upon by respondents is *Washington, etc., Ins. Co. v. Seminary*, 52 Mo. 480. The note which was the basis of the action in that case was as follows:

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“\$750.

“For value received in policy number 2,969, dated the fourteenth day of March, 1866, issued by the Washington Mutual Fire Insurance Company, of St. Louis, I promise to pay said company (or their secretary for the time being) the sum of \$750, in such portions and at such time or times as the directors of said company may, agreeably to their acts of incorporation, require.

“DANIEL MCCARTHY,

“President.

“Per THOMAS BURKE.”

This court held that it was competent to explain the ambiguity on the face of the note itself. Speaking for the court, Judge SHERWOOD said in that case: “In the present case, the note sued on is signed ‘Daniel McCarthy, President.’ But president of what? Just here, under the rules laid down in the above cases, parol evidence steps in and affords a ready and satisfactory explanation. The word ‘president,’ attached to the name of Daniel McCarthy, is an earmark of the official capacity in which the note was signed,—not evidence, it is true, that the note was signed in that capacity, but a sufficient basis for the introduction of testimony tending to establish that fact.”

Moreover, in that case the note on its face referred to policy number 2,969, which insured the seminary building and church building belonging to St. Mary's Seminary. It will be observed, *first*, that the above note is *not negotiable*, and, *secondly*, that the ambiguity appears on its face, growing out of the word “president,” affixed to McCarthy's name. In the case at bar, the notes are, by their terms, *negotiable*, and contain nothing but Jackson's name as maker; so that this case is not authority, because the facts are entirely different. It is true, however, that, in this case, Judge SHERWOOD quotes from the decision in *Mechanics'*

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Bank of Alexandria v. Bank, 5 Wheaton, 327, in which the supreme court of the United States says: "It is by no means true, as was contended in argument, that the acts of agents derive their validity from professing on the face of them to have been done in the exercise of their agency." If this were all, it must be conceded that respondents are justified in claiming that this decision is broad enough to permit parol evidence in any case to explain who was the principal, notwithstanding there is no intimation on the face of the paper that any one but the agent is a party to it. But the supreme court of the United States did not put their decision on that ground; but, on the contrary, Justice JOHNSON, who delivered the opinion, expressly says: "But the fact that this appeared *on its face* to be a private check is by no means to be conceded; on the contrary, the *appearance* of the *corporate* name of the institution *on the face of the paper* at once leads to the belief that it is a *corporate*, and not an individual, transaction; to which must be added that the cashier is the drawer, and the teller the payee, and the form of ordinary *checks* deviated from by the substitution of '*to order*' for '*to bearer*.' The *evidence*, therefore, on the *face* of the bill predominates in favor of its being a bank transaction. But it is *enough* for the purposes of a defendant to establish that there *existed* on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other, and, in such a case, to resort to extrinsic evidence to remove the doubt." So that it seems clear that the supreme court placed its decision upon the fact that, upon the face of the paper the ambiguity appeared. That court would never have held that there was any ambiguity on the face of the notes sued on in the third, fourth and fifth counts in the case at bar. *Falk v. Moebs*, 127 U. S. 597.

In 31 Mo. 193 (*Smith v. Alexander*) the action was on the following note:

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"\$500.

ST. LOUIS, Mo., July 22, 1855.

"Ninety days after date I promise to pay to the order of Messrs. Smith & Co. \$500 for value received, negotiable and payable without defalcation or discount.

"J. H. ALEXANDER,

"Treasurer Ohio & Miss. R. R. Co."

In that case Alexander, having been sued on this note, was allowed to show that he was treasurer of the said railroad, and that he gave the note simply as agent of said company, Judge EWING saying: "A mere addition to the name of the party signing the contract cannot be regarded as a certain *indicium* that it was made on behalf of another. When, however, it is *doubtful from the face* of the contract whether it was intended to operate as a personal engagement of the party signing it or to impose an obligation on some third person as principal, evidence is admissible to show the character of the transaction." So we see that Judge EWING places his ruling on the *doubt* appearing on the face of the note, whether it was the obligation of Alexander or the railroad company.

Shuetze v. Bailey, 40 Mo. 69, was an action on a contract for half the value of a partition wall. It was not a negotiable instrument at all, and in that case the contract was signed, "Kenneth McKenzie, Agent for Volney Stevenson, on the first part;" so that case is not similar in any legal feature to the one at bar. In *Musser v. Johnson*, 42 Mo. 74, action was brought on a written assignment of a certain claim against Johnson and others by Isaac H. Sturgeon, President North Missouri Railroad Company, "attested with the seal of the company, and countersigned by Geo. H. Blood, Secretary North Missouri Railroad Company." It was held to be the act of the company. The instrument was not negotiable, and the paper on its face clearly showed it was the intention to assign the railroad company's right.

The next case we are cited to is *Ferris v. Thaw*, 72 Mo. 446. In that case the note or instrument read:

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"\$4,000. ST. LOUIS, Mo., October 3, 1870.

"Twelve months after date I promise to pay to the order of John W. Luke, treasurer, \$4,000, without defalcation or discount, for value received, negotiable and payable at the Third National Bank of St. Louis, with ten-per-cent. interest from date, payable semi-annually.

CHARLIE THAW,

"W. M. Polar Star Lodge. Number 79.

"Indorsed :

JOHN W. LUKE,

"Treasurer."

In that case the defendants were sued as members of Polar Star Lodge number 79 of Ancient Free and Accepted Masons. Defendant Thaw was its chief officer, with the title of worshipful master. In that case it was shown that the lodge was an unincorporated body; that it had borrowed this \$4,000 for lodge purposes. The loan was reported to the lodge and was approved at its meeting, all the defendants voting therefor. It will be observed that in this case the ambiguity appears on the *face of the paper*, and the court properly permitted evidence to show who were the real principals, and the members of the lodge which received the money were held on it. It is true the learned judge quotes from Story on Agency and uses language that might be construed to include any undisclosed principal; but it is not practicable in every case to go over the entire law, and point out all the qualifications that might be mentioned, and, when the law, as quoted, applies to the controlling facts in the case, it must be understood as referring to those facts. It is clear to us that the learned judge who delivered that opinion had no intention of discussing the proposition now under consideration. The case was placed upon the ground that, the lodge having failed to become a corporation, its members were liable as copartners; and they were all shown to have ratified the act of the worshipful master, and his agency appeared on the paper itself, so that it was unnecessary to discuss the question as to the liability of a person on an instrument

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to which he was not a party. *Martin v. Fewell*, 79 Mo. 401; *Richardson v. Pitts*, 71 Mo. 128.

It remains only to notice *Franklin Avenue German Saving Institution v. Board of Education*, 75 Mo. 408. That was an action on a school bond, as follows:

"It is hereby certified that the special school district of the town of Roscoe, county of St. Clair, state of Missouri, is indebted to ———, or bearer, in the sum of \$500, payable * * *. This bond is issued under and by virtue of an act of the legislature of Missouri entitled 'An act to authorize cities, towns and villages to organize for schools with special privileges.

"JAS. SMANGER,

"HENRY SWANN,

President.

"Secretary."

Of course, on the face of this bond, it was the bond of the school-district, and no such question as the one at bar was before the court.

In *Snider v. Adams Express Co.*, 77 Mo. 525, Snider was the *consignor* of the lost package, and this court held that, although the package was the property of his sister Louisa, that Snider was the trustee of an express trust, and authorized to sue. No question of negotiable paper was involved in the case, so that it will appear from an examination of each of the cases relied on by respondents as sustaining the action of the court in admitting parol evidence to show that Jackson was in fact the president and purchasing agent of appellant, and executed the three notes described in third, fourth and fifth counts in behalf of said company, they are all unlike this case, in that in each of them there was some addition, such as "president," "worshipful master," "treasurer," or some title designating an agency on the face of the paper itself, and in such cases the law permits the ambiguity to be explained; and, indeed in all other contracts except bills of exchange and negotiable promissory notes it is always permissible to show by parol

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evidence who is the real principal. Tiedeman on Commercial Paper, sec. 87, and authorities cited. But, wherever the cases have been reviewed, we think, it will be found that, although the rule has been relaxed in those cases where the maker or drawer adds the word "agent," or "president" or the like after his name, yet in negotiable instruments, when the principal's name does not appear, he is not liable *on the bill or note as a party to the instrument*. *Devendorf v. Oil Co.*, 17 W. Va. 135; *Fuller v. Hooper*, 3 Gray, 341; *Williams v. Robbins*, 16 Gray, 77; *Pease v. Pease*, 35 Conn. 131; *Keck v. Brewing Co.*, 22 Mo. App. 187; *Bartlett v. Tucker*, 104 Mass. 339.

What we have here said is not in conflict with another equally well-settled rule, that a party may bind himself by another than his true name, where he signs any instrument with intent to bind himself, or signs any name under which he is shown to have held himself out to the world and carried on business. In these cases he is as much liable as if he had signed his true name. *Bartlett v. Tucker*, 104 Mass. 339.

With this view of the law, then, we hold the court erred in the admission of parol evidence to show that Jackson executed the three notes sued on in third, fourth and fifth counts, and in giving instruction, numbered 8, as prayed by plaintiffs. In regard to the refusal to give the twenty-third instruction asked by defendant we think the court committed no error. We do not think any such issue was properly tendered the plaintiffs, nor do we think there was sufficient evidence to justify it, if properly pleaded. We are driven by our views of the law to affirm the judgment of the circuit court on the first and second counts, and reverse the judgment on the third, fourth and fifth counts. *Hunt v. Railroad*, 89 Mo. 607, and cases cited. All the judges of division number 2 concur.

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BARRETT *et al.*, Appellants, v. DAVIS *et al.*

IN BANC.

1. **Deed: ACKNOWLEDGMENT, IMPEACHMENT OF.** In Missouri, a certificate of acknowledgment of a conveyance of land may be avoided by evidence of its falsity; but there should be a clear preponderance of evidence to warrant such a finding.
2. **Married Woman: SEPARATE ESTATE: SURETYSHIP.** Where the separate estate of a wife is mortgaged to secure her husband's note, her estate stands in the relation of surety to that debt.
3. **Surety: EXTENSION OF TIME TO DEBTOR: RELEASE OF DEBT.** A contract between debtor and creditor for an extension of time of payment for any definite period, without consent of the surety, discharges the latter.
4. — : — : CONSENT OF SURETY. Where such agreement is made upon condition that the surety assents thereto, it does not discharge the latter.
5. — : — : —. Such condition may be verbal and collateral to a written agreement.
6. **Written Contract: EVIDENCE.** Facts showing that a writing never acquired original vitality as a contract are admissible in evidence.
7. **Married Woman: SEPARATE ESTATE: SURETYSHIP: EXTENSION OF TIME TO DEBTOR.** A married woman, as to her separate estate, is, in equity, held competent to consent to an extension of a debt for which her estate stands as surety, or to ratify such an extension as indicated below.
8. **Notice: FACTS PUTTING ONE ON INQUIRY.** Facts and circumstances which would naturally put a person of ordinary caution on an inquiry, reasonably leading to knowledge of the truth, are evidence from which that knowledge may be found.
9. **Principal and Agents: ACQUIESCENCE IN ACTS OF AGENT.** A principal's long acquiescence (here, four and a half years) in, and enjoyment of the fruits of, a transaction had on her behalf, by an agent with assumed authority, *held* a ratification of the transaction.
10. **Practice in Supreme Court in Equity Cases: ERRONEOUS EVIDENCE.** In suits in equity the supreme court, on appeal, may discard evidence erroneously admitted in the trial court, without remanding for a new trial.

104	549
126	10
104	549
131	318
104	549
132	610
66a	413
104	549
151	21
80a	666
104	549
165	609
104	549
84a	168
104	549
80a	550
104	549
174	*206
104	549
179	*892

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Appeal from Johnson Circuit Court.—HON. CHARLES W. SLOAN, Judge.

AFFIRMED.

PLAINTIFFS are husband and wife. The purpose of their present suit is to set aside a deed of trust in the nature of a mortgage, made in 1882, conveying Mrs. Barrett's land (her sole and separate property in equity), to secure a note of Mr. Barrett for \$3,000 and interest.

The defendants are the holders of the note secured and the trustee (with power of sale), named in the deed of trust.

The petition alleges two grounds or causes of action. By the first it is asserted, in substance, that the incumbrance is not binding on Mrs. Barrett for two reasons, *first*, because of a false certificate of acknowledgment by the notary, it being claimed by plaintiffs that she was not examined separate and apart from her husband and did not acknowledge that she executed the instrument freely, etc.; and, *secondly*, because of a forgery in the insertion of a description of twenty acres of other land than that originally described when the deed was delivered.

The second cause of action proceeds on the theory that Mrs. Barrett occupied the attitude of a surety toward the debt secured by the deed of trust, and that the creditor released her and her land in consequence of a valid agreement by him with Mr. Barrett to extend the time for payment of his said debt, without her consent.

The answer, in substance, denies the facts alleged in the first count; and, as to the second, asserts the full knowledge and consent of Mrs. Barrett to the extension of time mentioned, and states the circumstances thereof.

The new matter was put in issue by a reply. A trial followed, resulting in a finding and decree for

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defendants. After the usual motions and other formal steps, plaintiffs appealed.

The agreement for the extension of time, mentioned in the opinion of the court, is as follows:

"This memoranda of agreement made and entered into by and between Charles H. Peck and E. P. Barrett witnesseth: That it is in consideration of the premises agreed that Charles H. Peck will take up a certain note of \$3,000, dated February 23, 1882, formerly held by him, and will grant an extension thereon to said Barrett of time of payment of one year, and said Peck agrees to forbear the enforcement of the deed of trust and payment of said note for one year from February 23, 1883; and in consideration thereof the said Barrett agrees to cause to be dismissed a suit now pending in the circuit court of Johnson county, Missouri, entitled Edwin P. Barrett *et al.* v. Geo. J. Davis *et al.*, and to pay the costs thereon amounting to \$66.10. And it is agreed that Frank J. Bowman may and shall pay and cause to be paid such moneys as may come into his hands from D. C. Thatcher and Charles P. Chouteau belonging to said Barrett, to said Charles H. Peck to be applied upon said note until the same is fully paid. Witness our hands this thirty-first day of May, 1883.

"CHARLES H. PECK.

"E. P. BARRETT.

"I assent to the within for Mrs. Susan P. Barrett.

"S. P. SPARKS, Her Attorney.

"I agree to the terms of the within as far as I am concerned therein.

FRANK J. BOWMAN."

The other facts essential to an understanding of the case appear in the opinion.

S. P. Sparks and *A. B. Logan* for appellants.

(1) The deed of trust possessed no validity for the reason that the statute was not complied with in taking the acknowledgment of Mrs. Barrett. *Belo v. Mayes*,

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79 Mo. 67; *Wannell v. Kem*, 57 Mo. 480; *Steffen v. Bauer*, 70 Mo. 399; *Sharpe v. McPike*, 63 Mo. 300; *Clarke v. Edwards*, 75 Mo. 87. The finding of the court on that issue raised by the first count in the petition was clearly against the weight of the evidence. This being a cause of equitable cognizance, the court will examine the testimony to ascertain that fact. (2) Where the wife mortgages her real estate to secure the debt of the husband she occupies the relation of surety to him and can avail herself of all the beneficial rights and remedies as any other surety. *Wilcox v. Todd*, 64 Mo. 388. (3) An extension of time of payment of a debt to a principal without the consent of the surety discharges the obligation of the surety. *Ins. Co. v. Houck*, 83 Mo. 21; *Ins. Co. v. Houck*, 71 Mo. 128. *First*. There is not a scintilla of evidence in this record tending to show knowledge, much less consent, of Mrs. Barrett, to support the burden resting upon defendants under their plea of ratification. *Second*. In this extremity they are driven to rely solely upon the authority of Sparks as her attorney to bind her to the extension. (4) An attorney employed in the usual way to conduct a suit has in general no authority to enter into a compromise without the sanction, expressed or implied, of his client. *Webb v. Grumley*, 48 Mo. 562; *Walden v. Bolton*, 55 Mo. 405; *Spears v. Ledergerber*, 56 Mo. 465; *Semple v. Atkinson*, 64 Mo. 504; *Roberts v. Nelson*, 22 Mo. App. 28; *Melcher v. Bank*, 85 Mo. 362; *Bradley v. Welch*, 100 Mo. 258; *Halker v. Parker*, 7 Cranch, 436; *Vanderline v. Smith*, 18 Mo. App. 55; see note to *Mechem on Agency*, secs. 809, 810. *First*. The presumptive authority of an attorney is not conclusive, but may be rebutted. *Mechem on Agency*, secs. 809, 810. *Second*. An attorney by virtue of his general employment in a cause has no authority to agree to an extension of time upon a demand. *Lockhart v. Wyatt*, 10 Ala. 231. (5) The plea of ratification was not made out by the defendants; it must be made with full

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knowledge of the transaction. It is the predicate of knowledge and acquiescence. The law will not presume a ratification by the principal of the unauthorized acts of his agent. *Express Co. v. Reno*, 48 Mo. 264. (6) The court erred in allowing in evidence the insurance policy on the property taken out by her husband and, without her knowledge and consent, assigned as security to defendant Peck, in the face of the testimony of F. B. Hawes, agent, that it was done without her knowledge or consent; it was *res inter alios acta*. The acts of Sparks, her attorney, in subsequently dismissing the suit, having been done without her knowledge or consent, did not show, nor tend to show, the ratification on her part of his act outside of the case in agreeing to the extension of time. (7) The court erred in permitting the attorney, Geo. J. Davis, to detail confidential and privileged communications between himself and his client, E. P. Barrett, without Barrett's consent, and against the objection of plaintiff and E. P. Barrett. Leading art., 28 Cent. Law Jour. p. 539; leading art., 28 Am. Law Reg., Jan. 1889; 1 Thomp. Trials, secs. 295-297, 298-300; *Wilson v. Godlove*, 34 Mo. 337; *Johnson v. Sullivan*, 23 Mo. 470; *Gray v. Fox*, 43 Mo. 570; *Davis v. Kline*, 76 Mo. 410; R. S. 1879, sec. 4017; *Cross v. Riggins*, 50 Mo. 335. Davis' testimony was upon vital points in the case; for this error alone the decree should be reversed. (8) The court erred in permitting evidence tending to establish that a portion of the money furnished by Peck to Barrett was used to pay off a prior incumbrance on the premises. There was no issue to which it was relevant. The defendant in his answer did not seek to be subrogated to any rights by reason of such application, and could not have been had he sought it. *Price v. Courtney*, 87 Mo. 387; *Wooldridge v. Scott*, 69 Mo. 669. Especially was this evidence illegal, irrelevant, incompetent and prejudicial to plaintiff in the face of the other testimony showing that the debt which that incumbrance secured

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was that of her husband, E. P. Barrett, constituting her his surety, merely. (9) The finding and decree is without any support whatever in the evidence. The extension of time was such as to release her as surety, and it devolved on defendants on this state of facts to establish by some unequivocal act that Mrs. Barrett had ratified the unauthorized act of her attorney, Sparks.

J. W. Suddath and O. L. Houts for respondents.

The evidence shows without substantial conflict that plaintiff Susan P. Barrett had actual knowledge of the agreement of May 31, 1882, of extending the time of payment of the note, and, as a party thereto, assented, and is bound by it. The trial court so found, and this court will defer somewhat to that finding. Her attorney had the right to consent to the agreement for her. *Davis v. Hall*, 90 Mo. 659; *Semple v. Atkinson*, 64 Mo. 504; *Black v. Rogers*, 75 Mo. 441; *Holker v. Parker*, 7 Cranch, 436; *Weeks on Attorneys*, sec. 330; *Wharton on Agency*, sec. 590, *et seq.* (2) With knowledge of the material facts, and with means of knowledge of all the facts, she permitted defendant Peck, relying on her action, to comply with the agreement in his part, complied on her own part and she is now estopped from denying her assent and repudiating the agreement to his injury. *Seimers v. Kleeburg*, 56 Mo. 196; *McQuie v. Peay*, 58 Mo. 56; *Hord v. Taubman*, 79 Mo. 101; *Turner v. Shaw*, 96 Mo. 22. (3) To release the deed of trust executed by Mrs. Barrett to secure the payment of the note of her husband, a valid contract must have been made, founded upon a sufficient consideration, extending the time of payment of the note for a definite time without her knowledge or consent. *Ins. Co. v. Houck*, 83 Mo. 21. (4) The testimony of the notary, W. C. Taylor, justified the finding of the court that the deed was properly acknowledged by Mrs. Barrett. Her own

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testimony left no doubt about it. She said she read it and made herself perfectly acquainted with its contents; that the notary asked her if she had done so and she told him she had. *Drew v. Arnold*, 85 Mo. 128. (5) It was as good as an equitable mortgage on her separate estate if not acknowledged by her, and cannot, therefore, be set aside. There was no alteration or change of the deed after its execution. The evidence would justify no other conclusion. This contention is abandoned by plaintiffs in their brief. (6) There was no error in admitting the testimony of Geo. J. Davis. This testimony stands uncontradicted that he was not attorney for either party at the time he drew the deed. He was simply employed by them to draw the deed, and communications to him were not privileged. *House v. House*, 61 Mich. 69; *Ins. Co. v. Reynolds*, 36 Mich. 502; 1 Am. St. Rep. 570.

BARCLAY, J.—This being a cause of equitable cognizance, it has been necessary to review the facts disclosed by the record of the trial.

I. As to the first count there was some evidence, chiefly by Mrs. Barrett, tending to contradict the essential facts recited in the certificate of acknowledgment. On the other hand, the notary gave a circumstantial and clear account of the transaction just as he described it officially.

In our state, in view of the obvious meaning of the statute on this subject, the courts have felt constrained to hold that such certificates may be avoided by evidence *aliunde* showing their falsity. *Mays v. Pryce* (1888), 95 Mo. 603; *Pierce v. Georger* (1891), 103 Mo. 540; 15 S. W. Rep. 849. That construction has been too long accepted as settled law to require re-examination now. But, in applying it, in view of the recognized presumption of correctness attaching to the acts of public officials, we are of opinion that there should be a clear and decided preponderance of evidence to warrant discarding as

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false any such certificate. Without reviewing the evidence in detail, it is enough to say that we find no such preponderance here.

We find equally untenable the position of plaintiffs in regard to the alleged interpolation in the instrument (after its delivery) of a description of twenty acres of land, additional to that admittedly inserted therein.

It was conceded by plaintiffs at the trial, that, on the face of the deed of trust, no trace appeared of any erasure or interpolation. It further was shown that the deed was written in St. Louis, by an attorney unacquainted with the locality of the land (Johnson county), who was furnished the description by Mr. Barrett at the time the latter made the loan. Mr. Barrett testified that the description of the twenty acres was not in the deed when it was read to him, and that the only land agreed to be incumbered was his wife's homestead in West Holden, Missouri. The draftsman of the deed and another witness (not a party to this litigation) testified that it was first written as it now reads. The circumstances of the making of the loan were stated, and, from all the evidence to this point, it seems to us clear, that there has been no change in the instrument since its execution. On both of the foregoing points we perceive no ground to reverse the finding of the trial court in favor of defendants.

II. As to the second count, it may now be assumed as settled law that the attitude of Mrs. Barrett toward the debt of her husband, secured by the incumbrance on her sole and separate estate, was that of a surety. It may likewise be assumed that Mr. Peck was the creditor when the writing of May 31, 1883, was executed, though, according to the recitals in it, his position was somewhat different. He had been the original lender of the funds on the note of Mr. Barrett, secured as stated, but had transferred the paper to other hands. On the date last named, the note was overdue and the

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land had been advertised for sale to satisfy the debt. January 26, 1883, the present plaintiffs had brought a suit in equity, which was then pending in the Johnson county circuit court against the same defendants as now, to set aside the incumbrance in question on grounds substantially identical with those appearing in the first part of their petition in this case. Their bill was resisted, and the cause was triable the second Monday of June ensuing, 1883.

In this situation of affairs, Messrs. Peck, Barrett, Bowman and Sparks met in St. Louis, May 31, 1883, and the writing, recited fully in the accompanying statement, was signed. Mr. Bowman was then the attorney of Mr. Barrett in litigation between the latter and Messrs. Chouteau and Thatcher. Mr. Sparks was the attorney of Mr. and Mrs. Barrett in the suit to set aside the deed of trust in Johnson county. The accounts of the execution of the writing in question are somewhat at variance, but it will not be necessary to enter into the details of the differences between the witnesses. It is sufficient to note the salient parts of the testimony as we interpret it.

The writing was the outgrowth of negotiations between Messrs. Peck and Barrett, the object of which, on the part of the former, evidently was to remove the litigation and question affecting and impairing the mortgage security, and, on the part of Mr. Barrett, to avert a sale of his wife's realty and obtain time to pay his debt.

Mr. Peck testified at the trial of this cause that Mr. Barrett applied to him, requesting this adjustment, said he would pay the costs of the suit then pending, and that, "with the understanding that Mrs. Barrett was to assent to it, I told him that I would take the note up and hold it," and, "in pursuance of that, this paper was shaped up; Mr. Sparks was sent for, and my understanding was that Mr. Sparks came there as Mrs. Barrett's attorney." Mr. Peck further stated that the

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writing was executed in duplicate (as it now appears) at about the same time, one evening. Messrs. Barrett and Peck each retained one of the originals, and each was produced at the trial.

Mr. Sparks testified that he had no authority to assent on behalf of Mrs. Barrett, and that he so stated before he signed the paper. This statement Mr. Peck denies, adding that, if it had been made, he would not have entered into the arrangement. Mr. Barrett was recalled as a witness after Mr. Peck had testified as indicated, but gave no version of that part of the interview which formed the point of difference last above noted.

Applying the law to these facts, we recognize the full force of the rule which discharges a surety where the creditor makes a contract with the debtor for an extension of time, whereby the former's right to enforce an existing liability is stayed for any definite period, without the consent of the surety. One of the reasons of this rule is found in equitable considerations, growing out of the surety's right to be subrogated to the creditor's, at any moment, by payment of the debt to the latter.

But the rule itself is now too universally acknowledged to require argument to sustain it. We refer to its reason merely to add that the principle underlying it demands that such a contract, to be effective as a release of the surety, must be one creating a valid and enforceable obligation against the creditor with respect of the enforcement of his claim against the principal debtor. Where the creditor and debtor enter into an agreement, on adequate consideration, for an extension, upon condition that the surety assent thereto, it does not amount to a release. Of course, there is none if the assent be given; and, if not, then the agreement to extend falls. *White v. Middlesworth*, 42 Mo. App. 368.

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Even where the agreement is in writing, and, on its face, imports an unequivocal extension of time, it may be shown verbally, if such be the case, that it was not to become operative as a contract until the surety assented. As was said of similar testimony by an eminent English judge (Sir WILLIAM ERLE, C. J.):— “It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation.” *Wallis v. Littell* (1861), 11 C. B. (N. S.) 369. Compare *Butler v. Smith* (1858), 35 Miss. 457.

Facts going to show that a writing never acquired original vitality as a contract are not considered as infringing the rule of evidence excluding verbal contradiction of writings. *Tracy v. Union Iron Works*, 104 Mo. 193.

So it was competent for Mr. Peck to agree with Mr. Barrett to extend the indebtedness of the latter, upon condition of Mrs. Barrett's consent to that arrangement, without thereby releasing her. The instrument drawn to express the actual agreement, no less than the circumstances of its execution, indicate no purpose on Mr. Peck's part, and, still less, any execution of a purpose, to extend the time of payment of the indebtedness, without her assent. The paper, as drawn, called for her assent; but, further yet, the principal stipulations between Messrs. Barrett and Peck necessarily involved affirmative concurrence on her part. By them it appeared that the pending suit in the circuit court of Johnson county should be dismissed and the costs therein (\$66.10) be paid by the plaintiffs. Mrs. Barrett was the chief party in interest as plaintiff therein, and the purpose of that suit was to invalidate this very incumbrance upon her land. It could not be dismissed without her assent, and its dismissal (and the costs paid therefor) formed an important part of the consideration supporting Mr. Peck's agreement to give time. Is it reasonable to suppose that the latter intended to

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grant Mr. Barrett the extension, irrespective of his wife's consent (the effect of which would be to release her property), while insisting upon a dismissal of the pending suit to thereby strengthen and confirm the original security which the deed of trust gave? We think not.

We do not doubt, in view of the writing itself and of the surrounding facts enlightening its meaning, that the principal agreement for extension was mutually intended to be conditional upon Mrs. Barrett's consent to its terms.

In this aspect of the case it is wholly immaterial whether her consent was in fact given or not. If not, the supposed agreement to give time was inoperative and constituted no release of her property. If it was, then, of course, she has no ground of complaint.

III. But we believe the conclusion we shall presently announce need not necessarily rest upon such a narrow basis as the application of the legal principles, above declared, affords. We are satisfied, from a thorough consideration of the record, that that conclusion may properly be placed upon broader grounds.

The agreement for extension was dated and closed May 31, 1883. The first suit then pending (between the same parties as are now before the court) was dismissed in vacation, June 6, 1883, by Mr. Sparks, as attorney for Mr. and Mrs. Barrett, the plaintiffs. The costs were paid. The June term of the Johnson circuit court, at which the cause was triable, was then near at hand. The land had been advertised for sale by the trustee.

Mrs. Barrett, as a witness, admitted that she objected to Mr. Barrett's going to St. Louis at that time, because she thought "they would get him into some great trouble," but that he went; on his return she asked, "How is the Peck affair? What about our case?" and he replied, "I have had that all fixed up. It is settled."

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The written agreement, of May 31, 1883, she said she found (the Sunday before the present suit was brought) in a trunk where she and her husband kept their papers; supposed it was given to her by Mr. Barrett, and she put it away; that she never authorized anyone to dismiss the first suit.

The present suit was brought December 27, 1887, long after the extension of time had expired, and more than four and a half years after the supposed "settlement," and the dismissal of the first suit. Let us bring certain legal principles to bear on these facts. In the transaction here in consideration, Mrs. Barrett, as the equitable owner of the land (held to her sole and separate use), was competent to act and contract in respect to it, either personally or by an authorized agent. She was not only capable of validly consenting to the extension of time, so as to bind her separate estate, but was likewise competent to ratify such consent, if given in her name, though without previous authority.

When one appropriates the full benefit of a transaction, taken on his behalf by another without prior authority, it is not then permissible to cast off the burden it imposes. The benefit and burden must be accepted together, or both repudiated. We mean, of course, after knowledge of the essential facts of the transaction. But, in the view of a court of equity, where plaintiffs now stand and by whose principles they must be judged, one is not regarded as meeting the full measure of his duty who wilfully closes his eyes to unwelcome facts while exercising vigilance to observe and take advantage of those favorable to him in the same connection.

Whether one actually knows a given fact is often a secret to which he alone has the key, but justice is not so indulgent as to encourage his throwing the key away. Applying to him the principles of common experience, it is held, quite generally, even in actions at law (*Van Raalte v. Harrington* (1890), 101 Mo. 602;

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14 S. W. Rep. 710), and, for stronger reason, in equity, that from facts and circumstances which would naturally put a person of ordinary caution, in the same situation, on an inquiry reasonably leading to a knowledge of the truth, a court may justly infer and find such knowledge. *Leavitt v. La Force* (1879), 71 Mo. 353. The probative force of such facts and circumstances must depend, in great measure, on the peculiarities of each case. We have already briefly sketched those which characterize the present one. They are somewhat unique, and sufficiently expressive in themselves to obviate the necessity of much further comment.

That Mrs. Barrett knew there had been some kind of settlement with Mr. Peck she admits. Her suit to set aside the deed of trust was dismissed by her attorney, and she was hence chargeable with knowledge of the dismissal. The advertisement to sell under that instrument was suspended. That some one had assumed to act for her, in some sort of settlement with Mr. Peck, was self-evident, and that her property was relieved thereby of immediate peril, equally so. The date at which she received the writing, containing the agreement, or first obtained access to it, is not disclosed with any exactness, but it plainly does appear that nothing was done in the way of suggesting any dissent to it, on her part, for more than four years from the dismissal of the first suit, and long after all the benefits it gave to the Barretts had been enjoyed.

On this evidence the learned circuit judge could scarcely have found otherwise than that she was, in equity, justly chargeable with knowledge of the terms of agreement with Mr. Peck shortly after it was made, and, necessarily, that her assent had apparently been given to those terms. With such knowledge it became her duty to speak promptly (if ever) in disowning the act done in her name, if without her sanction. She could not wait to reap the advantages it gave her and then cut down the fruits it secured to the other party.

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We entertain no doubt that four years was an unreasonable delay in the circumstances, and that, after it, she must be held, in equity, to have fully ratified the transaction. *Chetwood v. Berrian* (1884), 39 N. J. Eq. 203; *Alexander v. Jones* (1884), 64 Iowa, 207; *Brigham v. Peters* (1854), 1 Gray, 139; *Deland v. Bank* (1884), 111 Ill. 323; *Law v. Cross* (1861), 1 Black, 533.

IV. Some objections have been urged to details of defendants' testimony as incompetent.

In suits of this nature, where the facts come properly in review, this court may discard such parts of the evidence as may have been erroneously admitted in the trial court, without the necessity of directing a new trial.

The conclusion we have reached follows deductions drawn, in the main, from plaintiffs' own testimony or from facts undisputed or uncontradicted.

The learned trial judge, who had the advantage of a personal view of the parties, found for the defendants. No sufficient reasons have been given for reversing his finding. The judgment is affirmed. All the members of the court concur.

THE STATE V. LUKE, *Appellant*.

DIVISION TWO.

1. **Criminal Law : MURDER : INDICTMENT.** The averment in an indictment for murder that the fatal blow was given on a specified day, and that the deceased languished one hour and then died, sufficiently charges the date of the death.
2. — : — : —. The indictment in this case *held* to sufficiently charge that the death of the deceased resulted from the effects of the blow inflicted by the defendant.

104	563
109	659
104	563
140	475
104	563
148	18

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3. **Criminal Practice: POSTPONEMENT OF TRIAL: EXCEPTIONS.** The refusal of the trial court to postpone the further trial of the cause until the next day to enable the defendant to procure the attendance of an absent witness, will not be reviewed in the absence of exceptions duly saved.
4. **Criminal Law: HOMICIDE: INSTRUCTIONS.** The evidence in this case held to have authorized the court to instruct on murder in the second degree and on manslaughter in the second, third and fourth degrees.
5. **Criminal Practice: INSTRUCTIONS.** It is not error for the court to refuse instructions embodying the same principle as those already given.
6. ——— : ———. Where the instructions asked in a criminal case may confuse the jury, it is the duty of the court to give in lieu of them an appropriate one on the issue of fact involved.
7. ——— : **NEW TRIAL: NEWLY-DISCOVERED EVIDENCE.** Where on an application for a new trial because of newly-discovered evidence its materiality, or the effort which had been made to discover it in time for the trial, does not appear, the new trial is properly denied.

Appeal from Andrew Circuit Court.—HON. C. A. ANTHONY, Judge.

AFFIRMED.

John M. Wood, Attorney General, for the State.

(1) The first instruction properly defines the technical terms. *State v. Thomas*, 78 Mo. 327; *State v. Gee*, 85 Mo. 647. (2) The second as to murder in the second degree is correct. See above cases. (3) The third as to the presumption arising from the wilful using upon another a deadly weapon at a vital part is correct. *State v. Talbot*, 73 Mo. 347; *State v. Thomas*, 78 Mo. 327. (4) The fourth as to manslaughter in the second degree is correct. *State v. Thomas, supra*. (5) The fifth as to manslaughter in the third degree is correct. R. S. 1889, secs. 3471, 3478. (6) The sixth as to manslaughter in the fourth degree is correct. R. S., sec. 3477; *State v. Umfried*, 76 Mo. 404; *State v. Ellis*, 74

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Mo. 207; *State v. Branstetter*, 65 Mo. 149. (7) Instruction marked "E," given on the part of defendant, embraced the same principle contained in instructions marked "B" and "C," which were prayed for by defendant, but refused, and no error was committed in refusing to give said instructions. Where proper instructions are given upon any question, it is not error to refuse others containing the same principle. *State v. Walton*, 74 Mo. 270; *State v. Smith*, 80 Mo. 516. (8) The motion for a new trial on the ground of newly-discovered evidence does not state that the evidence is material, or what efforts had been made to discover it in time. *State v. Fritterer*, 65 Mo. 422; *State v. Ray*, 53 Mo. 345; *State v. Laughlin*, 27 Mo. 111; *State v. Butler*, 67 Mo. 59; *State v. Barham*, 77 Mo. 52. (9) The evidence set out in the affidavits filed in support of the motion for a new trial did not tend to prove any manner of defense. *State v. Smith*, 65 Mo. 313; *State v. Butler*, *supra*; *State v. Barham*, *supra*.

MACFARLANE, J.—The defendant was indicted in the criminal court of Buchanan county, for the murder of Frank Callahan. Upon the application of defendant, a change of venue was granted him to Andrew county, in which county defendant was tried and convicted of murder in the second degree.

The evidence on the part of the state shows that, at the time of the homicide, John Self kept a saloon and restaurant on South Sixth street in the city of St. Joseph, Missouri. Early in the evening of Saturday, September 14, 1889, deceased went to this saloon and remained there until the difficulty which is alleged to have resulted in his death. The evening was spent in playing cards with different persons and in drinking. Defendant was engaged in the restaurant as a cook. The evidence does not disclose how he spent his evening, until about eleven o'clock, when he was engaged in cooking supper for Geo. L. Winters, one of the patrons of the house.

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The following is the substance of the testimony of Charles Tatum, who was called as a witness by the state: "I am a brakeman on the railroad. I know where John Self's place of business is in St. Joe. It is on South Sixth street. I saw defendant and deceased at that place on the night of the difficulty. I went to that place about eleven o'clock at night. The difficulty commenced in this way: Callahan did not want to go home, on account of its raining at the time; but John Self said he would have to shut up, that he could not keep open for one man. Defendant was in the back room (restaurant) at this time, but came in and said that he (Callahan) had to go when it was time to shut up, and Callahan made the remark that he did not want to go out in the rain; Callahan said if Jim was down there he could stay. He said Jim Self was a gentleman. Luke said, 'Do you mean to insinuate that John Self ain't a gentleman?' Callahan said he didn't know John Self, but he did know Jim Self. By this time I think Mr. Winters came out, and Luke, I think, asked us up to drink, and asked Mr. Callahan to drink. But Callahan would not drink with him; and so we took a drink. Then Callahan asked us to drink, but Luke would not drink with him. So Callahan drank alone. Then they commenced talking about sense. Luke said Callahan had no sense, and Callahan said that he didn't know as he had very much anyway; Luke said he could give him some sense; and Callahan said, 'No, I don't want sense in the way you want to give it to me.' They kept on talking that way a little bit, and then Luke struck him, and then they commenced warding off licks; I don't know as either one hit the other with fists; Luke could not make any headway on him, and he picked up a chair and hit him on the left side of the head; it was a large wooden chair; he took hold of the chair with both hands; when he hit him with the chair, Callahan was standing about a foot and a half from the bar; he said that was a pretty hard blow; I saw some

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blood on his ear. After deceased was struck he didn't try to do anything more; he went out at the door, and defendant went in the kitchen; he (defendant) soon returned with a butcher knife; Callahan started to come back into the door, but John Self came from behind the bar and went out and stopped him; I heard Callahan tell him if he would give him a half a pint of whiskey he would go home; so John Self said he would, and told him to stay there at the door until he went and got it; and he got the whiskey and went to the door and gave it to him; Callahan was drinking some at the time, but he was not what you might call drunk. This occurred about twelve o'clock at night, on the fourteenth of September, 1889; I saw the deceased the next day; had a scar on the left side of his head." Two or three other witnesses testified substantially as did Tatum.

Two police officers testified that between twelve and one o'clock they found deceased lying on the south porch of a vacant office about half a block from Self's saloon. When found he was groaning and unconscious, and died within a few minutes.

The coroner, assisted by two other physicians, made a *post-mortem* examination of deceased. They found a wound on the left side of the head, immediately over the ear, in the form of a triangle, an inch and a quarter running across the head, and an inch and a quarter running down the head, making a flap which raised up with a square corner. It was an ugly-looking wound at the time, and looked as if the skull might be fractured. There were no other visible marks on the body anywhere. On taking off the skull it was found there was no fracture. On the right side of the brain evidence of concussion were found and extravasation. The opinion was that death ensued from concussion produced by a blow on the left side of the head.

Defendant called two witnesses who testified that, between twelve and one o'clock, on the night in question, they were passing on the opposite side of the

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vacant office at which deceased was found, and heard and saw two men quarreling, and one of them knocked the other down. The fallen man did not get up, and they (witnesses) passed on and saw nothing more.

The court instructed the jury on murder in the second degree and manslaughter in the second, third and fourth degrees.

Defendant asked three instructions which were refused. The first of these, marked "A," was as to the presumption of innocence the law throws around those charged with crime. The other two, "B" and "C," were based on the hypothesis that the fatal blow was struck by some unknown person after the difficulty with defendant and after deceased had left the saloon.

The court gave the following instructions :

"9. The court instructs the jury that the defendant is presumed to be innocent of the offenses charged ; that, before you can convict him, the state must overcome that presumption by proving him guilty beyond a reasonable doubt. If you have a reasonable doubt of defendant's guilt, you must acquit him. But a doubt, to authorize an acquittal, must be a substantial doubt, founded on the evidence and not a mere possibility of innocence."

"(e) The court instructs the jury that, in order to find the defendant guilty of either murder or manslaughter, they must believe from the evidence, beyond a reasonable doubt, that the deceased came to his death from the effects of the blow of the chair used by the defendant, and not from injuries received afterward in another difficulty or assault.

"(f) The court instructs the jury that, if they find the defendant guilty beyond a reasonable doubt, but have a reasonable doubt as to whether the defendant is guilty of murder in the second degree or of manslaughter in either degree, as defined in these instructions, they will find the defendant guilty of the lowest offense."

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Defendant filed no abstract of record, brief or assignment of error. We have, as required, made a careful examination of the record and have considered all exceptions found therein, and will briefly state the conclusion reached upon each.

I. Objection was made to the sufficiency of the indictment, in that, as is insisted, it did not charge when the deceased died, or that he died from the effects of a blow received at the hands of defendant. The indictment after charging that on the twentieth day of September, 1889, defendant struck one Frank Callahan on the side of the head with a chair thereby producing a mortal wound, makes the following averment, "of which said mortal wound he, the said Callahan, for the space of one hour, did languish, and languishing died, then and there at said time and place, at said county aforesaid, of the mortal wound aforesaid, so received as aforesaid, by the said Frank Callahan, at the hands of said Adelbert Luke as aforesaid, then and there died."

The charge that the death of deceased resulted from the effects of a blow inflicted by defendant is distinctly made. In that respect the indictment is in the usual approved form. While it is necessary to charge the time of the death of the person killed, it is held sufficient to aver the date of the assault, and that deceased then and there died therefrom. The word "then" has relation to "that" time, and "there" to the place previously stated. *State v. Steeley*, 65 Mo. 221; *State v. Sundheimer*, 93 Mo. 313. The charge that the fatal blow was struck on a specified day, and that deceased languished one hour and then died, sufficiently indicates the date of the death.

II. After the trial had progressed to near the conclusion, defendant asked for a postponement until the next day in order that he might have opportunity to procure the attendance of a witness from another county. The court refused to grant the indulgence, and defendant complains of its action. At the time this

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request was made, it was not shown that any diligence had been used to have this witness present at the trial, nor what defendant expected to prove by him. No exception at the time was saved to the action of the court in refusing the postponement. In order to entitle a party to a review of the action of the trial court, it is necessary that exceptions be taken at the time of the adverse ruling. This rule applies as well to criminal, as to civil, cases. *State v. Elvins*, 101 Mo. 246; *State v. Brannum*, 95 Mo. 22; *State v. McDonald*, 35 Mo. 542.

The affidavit of defendant in support of his motion for a new trial, to the effect that he had applied for a postponement for the purpose of giving him time to procure the attendance of witnesses, gives no additional support to his claim to have the action of the court reviewed, though he does state in the affidavit that he was not informed, until his application was made, that the evidence of the absent witnesses would corroborate other of his witnesses on a material fact. That information should have been given the court at the time the application was made. The record shows that the application, at the time it was made, was put upon the ground that defendant supposed the absent witnesses had been recognized by the state to be present to testify at the trial. Proper diligence required him to use all proper means to enforce the attendance of his witnesses, and not depend upon the diligence of the state to assist him. The action of the court was entirely justifiable under the circumstances. So far as the court was advised the application was merely for the purpose of delay and was properly overruled.

III. The evidence in the case warranted the court in instructing the jury on murder in the second degree and manslaughter in the second, third and fourth degrees. This the court did by instructions entirely unobjectionable. The court also properly instructed the jury on the presumption of defendant's innocence,

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and that the state was required to overcome that presumption by proving him guilty beyond a reasonable doubt. This instruction covering the same principle as that contained in instruction "a" asked by defendant rendered the latter unnecessary, and there was no error in refusing it.

Instructions "b" and "c," asked by defendant and refused by the court, were mere repetitions of the same propositions in different language.

The court may reasonably have been dissatisfied with them both, and believed them to be calculated to confuse rather than enlighten the jury. Under such circumstances it was the duty of the court to give the jury an appropriate instruction upon the issue of fact involved. *State v. Jones*, 61 Mo. 234; *State v. Walton*, 74 Mo. 270; *State v. Smith*, 80 Mo. 517.

Instruction "e" given by the court in simple, clear and intelligible language fully covered the principle contained in the instructions refused. Defendant could not have been prejudiced by a refusal to give these instructions.

IV. In his motion for a new trial, and as grounds therefor, defendant stated that since the trial he had discovered new evidence but does not state its materiality or the efforts that had been used to discover it in time for the trial. These omissions were themselves sufficient justification to the court in overruling the point. *State v. Fritterer*, 65 Mo. 422; *Snyder v. Burnham*, 77 Mo. 52; *State v. Butler*, 67 Mo. 59.

Besides, from the affidavits filed it appears that the newly-discovered evidence was that of the witnesses whose knowledge was learned during the progress of the trial, and to obtain whose testimony a postponement was asked. The ruling of the court on this question has been considered under paragraph 2.

We have given careful examination and consideration of the record in this case, and all questions involved therein, and find no error justifying a reversal of the judgment. Judgment affirmed; all concur.

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104	572
130	261
104	572
75a	465

104	573
146	322

THE SOUTH JOPLIN LAND COMPANY V. CASE *et al.*,
Appellants.

DIVISION ONE.

1. **Corporation: PROMOTERS: TRUST AND CONFIDENCE.** Persons, usually called promoters, who project and form a corporation by soliciting and procuring others to subscribe for and take shares of stock for the purpose of selling to the corporation property which they own or have a right to acquire by executory contract, occupy a position of trust and confidence, and it devolves upon them to make full disclosures of their interest in and relation to the property.
2. ——— : ——— : ———. Where the promoters form such association or initiate its formation, from that time they stand in a confidential relation to each other and to all others who may subsequently become members or subscribers, and it is not then competent for any of them to purchase property for the purpose of such a company and sell it at an advance without a free disclosure of the facts.
3. **Practice: AMENDMENT: NON-REVERSIBLE ERROR.** It is not a ground of reversal of a judgment that the trial court permitted an amendment of a petition by interlineation, even where such amendment is the averment of an additional demand against the defendant.

Appeal from Jasper Circuit Court.—HON. M. G.
 MCGREGOR, Judge.

AFFIRMED.

L. P. Cunningham and Thomas Dolan for appellants.

(1) There was not in law or equity any sale of the notes. Nothing but the land was sold. 1 Story on Contracts, pp. 40, 45; Chitty on Contracts, pp. 136, 591; *Taylor v. Williams*, 45 Mo. 80; *Underwood v. Underwood*, 48 Mo. 527; *Sitton v. Shipp*, 65 Mo. 305; *Benjamin on Sales* [2 Ed.] 1; *Williamson v. Berry*, 8 How.

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(U. S.) 544. (2) Case was but a stockholder, and had a right to make \$2,000 profit upon the land, and as much more as he could. He was not required to inform plaintiff or anybody else what he (Case) was paying for the land. He was the absolute purchaser of the land from Carter, and had a right to fix any price he saw proper. *Hardwicke v. Jones*, 65 Mo. 54; *Angell & Ames on Corporations*, sec. 313; *Verplanch v. Ins. Co.*, 1 Edward, Ch. (N. Y.) 87; *Hodges v. Screw Co.*, 1 R. I. 351; *Bayless v. Orne*, 1 Freeman (Miss. Ch.) 174; *Railroad v. Freeman*, 37 Kan. 606; *Railroad v. Wilkerson*, 83 Mo. 237; *Spurlock v. Railroad*, 90 Mo. 200; 3 Parsons on Contracts [5 Ed.] p. 385, note; *Medbury v. Watson*, 6 Met. (Mass.) 259; *Hemmer v. Cooper*, 8 Allen (Mass.) 334; *Bishop v. Small*, 63 Maine, 12; *Holbrook v. Connor*, 60 Maine, 578; *Cooper v. Levering*, 106 Mass. 79. (3) It is not applicable to press that Redburn, being a director of plaintiff, held a fiduciary relation; for the sale was in fact made to the individuals by Redburn as agent for Case, and afterwards they formed themselves for convenience into the corporation plaintiff. *Hogan v. Hogan*, 71 Mo. 610; *Chrisman v. Hodges*, 75 Mo. 413; *Pomeroy v. Benton*, 57 Mo. 531; *Attaway v. Bank*, 93 Mo. 485. (4) Knowing that Redburn was Case's agent, and plaintiff then making him a director cannot now complain and say that Redburn thereby held a fiduciary relation to the plaintiff. *Fitzsimmons v. Express Co.*, 40 Ga. 336; *Rowe v. Stevens*, 3 Jones & Sp. 189; *Spyer v. Fisher*, 5 Jones & Sp. 93; *Lewis v. Slack*, 27 Mo. App. 119; *Attaway v. Bank*, 93 Mo. 485; *Rupp v. Sampson*, 16 Gray (Mass.) 398; *Muller v. Keetzleb*, 7 Bush (Ky.) 253; *Ins. Co. v. Church*, 21 Ohio St. 492; *Anderson v. Weiser*, 24 Iowa, 428. The circuit court erred in allowing the amendment of the petition by interlineation. R. S., secs. 3567, 3573, 3576, 3577; *Skinner's Ex'r v. Hutton*, 33 Mo. 244; *Ins. Co. v. Ins. Co.*, 4 Mo. App. 578. (5) The finding and decree should have been in favor of

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the defendants upon the facts proved as to both the notes and \$2,000. Benjamin on Sales [2 Ed.] 1; *Williamson v. Berry*, 8 How. (U. S.) 544; 5 Wait's A. & D., p. 539, and cases cited; *Hardwicke v. Jones*, 65 Mo. 54; Angell & Ames on Corporations, sec. 313; *Verplanch v. Ins. Co.*, 1 Edward, Ch. (N. Y.) 87; *Hodges v. Screw Co.*, 1 R. I. 351; *Bayless v. Orne*, 1 Freeman (Miss. Ch.) 174; *Railroad v. Freeman*, 37 Kan. 606; *Railroad v. Wilkerson*, 83 Mo. 237; *Bank v. Aull*, 80 Mo. 199.

E. O. Brown, Galen Spencer and Karnes, Holmes & Krauthoff for respondent.

(1) One occupying a trust relation can make no secret profit by reason of his position, and this principle applies to the promoter of a corporation. *Calico Co. v. Green*, L. R. 5 Q. B. Div. 109; *Twycross v. Grant*, L. R. 2 C. P. Div. 469; *Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73; *Hinchens v. Congrev*, 4 Russ. Ch. 562; *Hinchens v. Congrev*, 1 Russ. & Myler, 150; *Beck v. Kautorowitz*, 3 Kay. & J. 230; *Benson v. Hearthorn*, 1 Yo. & Col. 326; *Rawlins v. Wickham*, 3 DeGex. & J. 304. (2) The rule has always been that any question as to the fairness of the bargain was immaterial; although what the company received was worth all or more than it paid, this constitutes no reason why the trustee should not disgorge. *Railroad v. Blakie*, 1 Macq. 461; *Pearson's Case*, 5 Ch. Div. 336, 341; *Calico Co. v. Green*, L. R. 5 Q. B. Div. 109; *Tyrell v. Bank*, 10 H. L. Cas. 26; *Michoud v. Girod*, 4 How. 503; *Coal Co. v. Sherman*, 30 Barb. 553. "The rule governs cases where there was no fiduciary relation at the time the contract was made, but where the person who makes it afterwards becomes a promoter and the company becomes entitled to the benefit of his contract or liable to perform its provisions." The leading opinion was delivered by Lord Chief Justice COCKBURN and the conclusion reached that the rule applies to all contracts entered into with an intention that a corporation shall

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be formed to carry it out. And this view was affirmed on appeal to the House of Lords. *Twycross v. Grant*, 25 W. R. 586; *Iron Co. v. Bird*, 33 Ch. Div. 85, 94; 60 L. T. Rep. 501; *Cornell v. Honey*, 8 C. P. 328; *Phosphate Co. v. Hartmont*, 5 Ch. Div. 394. (3) In a New York case based upon similar facts, it was held that there was no difference in principle between a purchase made by one on behalf of the corporation after it is formed and a purchase made with the design to form a corporation to carry out the contract. *Getty v. Devlin*, 54 N. Y. 403; *Miller v. Barber*, 66 N. Y. 558; *Getty v. Devlin*, 70 N. Y. 504.

BLACK, J.—This is a suit in equity brought by the plaintiff corporation against Geo. C. Case and F. M. Redburn to recover the value of certain notes amounting to \$2,060. During the trial the petition was amended so as to include a demand against Case alone for the further sum of \$2,000. There was a decree according to the prayer of the petition as amended.

Dr. Carter who resided at Carthage owned three hundred and twenty acres of land adjoining Joplin. Part of the land had been laid off into an addition, and Carter had sold some of the lots, but he held notes for the deferred payments on the lots so sold. These notes were supposed to aggregate \$3,000 or \$4,000. In March, 1887, Carter gave Case a written option contract by the terms of which he agreed to convey and transfer to Case the land and unsold lots, the notes and a right-of-way claim against a railroad company, for the consideration of \$32,000, one-third cash and the balance in deferred payments to be secured by deed of trust on the land. The contract had thirty days to run, and if not performed by Case within that time he forfeited the \$500 paid at the date of the contract. Though this contract stated a consideration of \$32,000, it is shown beyond all doubt that Case was to pay only \$30,000 for all the property. When Case procured the contract he had in

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contemplation the organization of a corporation to take the property so purchased and this was known to Carter, for he then agreed to take two shares of stock, if the stock should not all be taken by other persons.

In April, and a few days before the option contract expired, Case employed the defendant Redburn to organize a corporation with a stock of thirty-two shares of \$1,000 each for the purpose of taking the property of Carter. Joplin then enjoyed what is commonly called a boom, and Redburn succeeded in placing all the stock in an informal way in one day, reserving to himself and to Case each a share. Redburn represented to the persons agreeing to take the stock that the price to be paid Carter was \$32,000, and that the proposed company would get the land, unsold lots and the notes held by Carter amounting, he said, to \$3,000 or \$4,000, and also the claim for right of way; and it was on these representations that the parties agreed to take the stock. Most of the persons agreeing to take stock knew that Redburn represented Case, and that Case held the option. Some of them did not know, at that time, that Case had anything to do with the matter. Case resided in Joplin and was perfectly cognizant of all that Redburn had done and of the representations that he had made.

The evidence of Redburn and Case is to the effect that on the next day Case told Redburn the notes would not go in and he must go and notify the parties to that effect. Case says he did not give Redburn authority to say the notes would be turned over to the company, and Redburn gives us to understand that he misunderstood Case's directions in that respect. Redburn says he did then notify some of the parties that the notes and right-of-way claim would not go in as part of the sale. There is a uniformity of statement on the part of the persons who agreed to take stock that they were not informed that the notes would not be included, until after the articles of association had been signed and they had

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paid for their stock. Our conclusion from the evidence is, that this notice that the notes were not to go in the transaction with the company was an afterthought on the part of Case, brought about by the fact that the stock commanded a premium. In a day or so after the stock had been thus informally placed, many of the stockholders met, signed articles of association, formally subscribed for stock, and paid their subscriptions. Directors were then elected, Redburn being one of them, and he was also made secretary. He and Case each took one share of stock. In a few days after this the board met to close up the transaction.

The evidence shows beyond doubt that on this occasion Redburn, representing Case, said the company would not get the notes. Mr. McClelland who was president and the largest stockholder objected, so that the project was about to be abandoned. Redburn, however, stated that he had been mistaken, and that Carter would not let the notes go in as part of the sale by him; that the time was close at hand when the option contract expired, and that Case would lose his \$500 unless the matter was closed up at once. On these representations the directors finally concluded to take the land and unsold lots without the notes. On the same day a deed of trust to Carter was executed, and the directors constituted Redburn an agent to close up the transaction with Carter. Redburn and Case went to Carthage on the same day, and the deeds were duly delivered. Redburn gave Carter checks for one-third of \$32,000, one of which was for the sum of \$2,500. Carter handed this check to Case in payment of the \$500 held as a deposit and the extra \$2,000 included in the consideration stated in the option contract. Carter says he received this check and then gave it to Case because Case wanted to make it appear the land had been sold for \$32,000. Carter at the same time gave Case the notes representing lots sold, but it appears they only amounted to \$2,060.

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Case and Redburn then repaired to a hotel, when Case gave Redburn a paper transferring to Redburn a one-third interest in the notes. He also gave Redburn a check for \$666.66. Case says he agreed to pay Redburn \$1,000 to organize the company and complete the transaction, but at the hotel they agreed upon \$666.66 and one-third of the notes as the compensation to Redburn.

A month or so after these transactions, McClelland became suspicious, and then asked Case if he got the notes from Carter, and Case said he did not. McClelland at once went to Carter and learned that Case did get the notes. It appeared for the first time, on the trial of this case, that Case received the \$2,000, and the petition was then amended so as to include that demand against him.

A matter much controverted here and in the trial court is as to what relation Case and Redburn sustained towards the plaintiff corporation. The plaintiff insists that their relation to the company was one of confidence and trust, while the defendants say they were strangers and had a right to deal with the persons taking stock and the corporation at arms' length. This issue is one of importance in this case as it now stands, since this is a suit in equity, and the petition proceeds upon the plaintiff's theory just outlined.

Persons who take an active part in procuring subscriptions and in organizing a corporation or company, called promoters, occupy a position often difficult to define. When the owner of the property deals with these promoters, representing himself only and they the proposed corporation, it is very clear, he occupies no position of trust or agency. He may deal at arms' length, as in other cases, being liable, however, for his over-fraudulent conduct.

But it is common practice for persons who own property, or who have acquired the right to purchase property, to project and form a corporation and induce

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others to become stockholders for the purpose of selling the property to the corporation at a profit. There is no rule of law which prohibits such a transaction and there should be none; for the law encourages a free alienation and transfer of property, both real and personal; nor does the mere fact that a profit is made in such a transaction render the party receiving it liable to account therefor. But the persons who thus project and form a corporation by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own or have a right to acquire by executory contract, do occupy a double position. On the one hand they represent their own interest in respect of the disposition of the property. On the other they represent the proposed corporation. And persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill and ability for the benefit of the company.

It is, therefore, clear on principle that promoters, under the circumstances just stated, do occupy a position of trust and confidence; and it devolves upon them to make full disclosure. Thus it was said in the case of *New Sombrero Phosphate Co. v. Erlanger*, L. R. 5 Ch. Div. 73-119: "A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to the property. I can see no difference in this respect between a promoter and a trustee, steward or agent."

So it has been said in this country: The second principle is, that where persons form such an association, or begin or start the project of one, from that time

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they do stand in a confidential relation to each other and to all others who may subsequently become members or subscribers, and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profits, because it legitimately is theirs. *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43-50. The position of trust and agency being once established the duty to make full disclosure, and the liability to account for profits made without such disclosure, follows, as has often been asserted—a proposition, not denied by counsel for defendants. *Bent v. Priest*, 86 Mo. 475; *Landis v. Saxton*, 89 Mo. 375.

The point of most difficulty in this class of cases is as to the time when this fiduciary relation arises. As to this it has been well said: On the one hand it is quite plain that a fiduciary relation between a promoter and a company may exist long before the actual formation of a company by registration or otherwise. On the other hand, it is obvious that something must be done beyond a purchase and resale to constitute such relation—something must, it is submitted, be done by the promoter to impose upon him the duty of protecting the interests of those who ultimately form the company. He assumes this duty if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control, and who are practically himself in disguise; he also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty, and who are in no way under his influence. 1 Lindley on Part. [4 Ed.] 584.

It remains to apply these principles to the case in hand. It is to be observed in the first place that Redburn was the agent of Case. We are also constrained to say that he was duly authorized by Case to make the

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representations which he did make to persons taking stock and to the directors after the company had been organized. His acts and representations were the acts and representations of Case. Case had the undoubted right to make the option contract with Carter, and he was under no obligation to sell the property to any company. But it is a significant fact that he then contemplated the formation of a corporation and had the consideration for the property stated to be \$32,000, while the true consideration was but \$30,000. He thereafter by his agent assumed and took upon himself the duty of soliciting his neighbors to take stock and of bringing the proposed corporation into existence for the express purpose of taking the property from himself. From that moment Case occupied a position of trust and confidence to the subscribers and also to the proposed corporation, and it became his further duty to make full disclosures of profits which he intended to make in respect of the transfer of the property. This he did not do. On the contrary he made breach of that duty in that he represented the purchase price from Carter to be \$32,000, when it was but \$30,000; and in this that he said Carter would not let the notes go in under the option contract, when in point of fact the notes were to be and were thereafter turned over to him. It, therefore, follows from what has been said that the \$2,000 and the notes belonged to the company, and the court was right in making the defendants account therefor.

It is argued that the directors finally consented to take the land and unsold lots at the price of \$32,000; that they got all they contracted for, and the company has no just ground of complaint. They did so consent, but it was upon the representation that \$32,000 was the true consideration paid Carter, and that the notes did not go to Case. For money and property acquired by Case under these untrue representations, occupying the position he did, he must account. What the company might have done had Case made full disclosure of his

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profits we cannot say, nor is it material to inquire. The argument made by defendants on this question is as bad in law as it is in morals.

Redburn took his one-third interest in the notes with full knowledge of facts which made the notes the property of the company, and he, like Case, must account therefor.

It is insisted by the defendant that the court erred in allowing the plaintiff to amend the petition at the close of the evidence, so as to include the claim against Case for \$2,000. The point of the objection is that the amendment should not have been made by way of interlineation. It is the settled and approved practice to make minor amendments by way of interlineation and erasure, such as adding or striking out the name of a party, correcting dates and obvious errors. But where as here new averments are made for the purpose of introducing a new claim or demand, the pleading should be rewritten, and should set forth all the matter, leaving the abandoned pleading undefaced. In the present case several clauses were inserted, and the petition should have been rewritten. This is the rule of the code of civil procedure. R. S. 1879, secs. 3576 and 3577. But after all the question whether the particular amendment may be made by interlineation is one resting largely in the discretion of the trial court. The fact that the amendment was made in this case by interlineation, when it should have been by filing a new and complete petition, constitutes no ground for reversing the decree. The judgment is, therefore, affirmed. The other judges concur.

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R. S. 1879, sec. 675. *Second.* The existence of this inchoate right of dower was not an act "done or suffered by appellant, nor those under whom he claimed." R. S. 1879, sec. 675; *Walker v. Deaver*, 79 Mo. 664; 4 Kent, Com., sec. 440; *Armstrong v. Darby*, 29 Mo.; *Bender v. Formberger*, *supra*; Rawle, Cov. Title, pp. 541, 575; *Alexander v. Schrieber*, 10 Mo. 460. *Third.* But conceding that the inchoate right of dower of Mrs. Collier constituted an incumbrance done or suffered by defendant or those under whom he claims—while this covenant was broken as soon as made, for which an action would instantly lie until there had not been an actual loss, eviction or its equivalent consequent thereon, and only nominal damages could be recovered. *Walker v. Deaver*, *supra*; *Hunt v. Marsh*, 80 Mo. 396; *Morgan v. Railroad*, 63 Mo. 129; *Matheny v. Mason*, 73 Mo. 677. *Fourth.* Mrs. Collier's inchoate right of dower was not title paramount capable of enforcement; it was merely contingent, and possessed no value—a mere possibility—an expectancy. *Durrett v. Piper*, *supra*. *Fifth.* The covenant sued on was not that the title conveyed should be merchantable, *i. e.*, such as might be acceptable to a purchaser, but that plaintiff should not be damaged in the possession by being evicted or disturbed. Her inability to find a purchaser who would buy the land with this inchoate right of dower outstanding was not a substantial breach of this covenant, and nominal damages only are recoverable; for only on the dower interest becoming consummate by the death of the husband can any paramount title arise, or any eviction become possible. By what standard can the right of an inchoate right of dower be measured? *Willets v. Burgess*, 34 Ill. 494. *Sixth.* When a grantee seeks to recover damages for a breach of the covenant against incumbrances, it devolves on him to show that the incumbrance discharged was such that the grantor was bound to pay off. *Bland v. Thomas*, 3 S. W. Rep. (Ky.) 595. *Seventh.* At the time of the

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institution of this suit, plaintiff had parted with her title and possession, and she could not maintain this action on covenants which run with the land that had inured to another by virtue of her deed. *Chambers v. Smith*, 23 Mo. 174. (2) The sale for taxes barred the inchoate right of dower of Mrs. Collier. *First*. It was within the power of the legislature to pass laws which would defeat an inchoate right of dower. Cooley on Const. Lim., p. 445; *Morrison v. Rice*, 29 N. W. Rep. (Mich.) 168; Tiedeman, Lim. Police Powers, sec. 117, pp. 341, 351. *Second*. The proceeding to enforce taxes by the state is always analogous to the exercise by it of the right of eminent domain, which it has always been held bars dower. *Brown v. Austin*, 41 Vt. 262; Tiedeman, Real Prop., sec. 132; *Robbins v. Barrow*, 32 Mich. 36; 1 Wash. Real Prop. [Ed. 1868] 220; *Moore v. City*, 8 N. Y. App. 110; *Finch v. Brown*, 3 Gilm. 448; *Jones v. Devore*, 8 Ohio St. 430. *Third*. The supreme court of Missouri has decided that a wife is not a necessary party to a partition proceeding when the husband is the owner, and that, notwithstanding she is not a party, her inchoate right of dower is barred. *Lee v. Lindell*, 22 Mo. 202. *Fourth*. A tax sale is clearly not within the saving provisions of section 2197. *Fifth*. The amount paid by Mrs. Blevins for attorneys' fees in negotiating the purchase was not a proper element of the damages. No suit had been brought, and the court erred in admitting evidence to establish it, and refusing appellant's instruction to the court sitting as a jury to disregard it in arriving at their verdict, numbered 3.

A. B. Logan and W. W. Wood for respondents.

(1) When respondent discharged the incumbrance created by the inchoate right of dower, the breach of warranty became substantial and she was entitled to recover the reasonable amount paid. *Durrett v. Piper*,

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58 Mo. 551; *Ward v. Ashbrook*, 78 Mo. 515; 1 Scribner on Dower, secs. 2, 4; *Prescott v. Truman*, 4 Mass. 627; *Shearer v. Ranger*, 22 Pick. 447; *Bigelow v. Hubbard*, 97 Mass. 195; *Harrington v. Murphy*, 109 Mass. 299. (2) The existence of the inchoate right of dower is an incumbrance covenanted against by the use of the words "grant, bargain and sell." *Ward v. Ashbrook*, 78 Mo. 515; *Williamson v. Hall*, 62 Mo. 405. It will be noted that the authorities cited by appellant are all cases arising under the statute, as it existed prior to the revision of 1879. The statute was amended, however, in 1879, so as to make the grantor liable for incumbrances "done or suffered" by any person under whom he claims. Rev. Code, 1845, p. 221, sec. 24; R. S. 1855, chap. 32, sec. 14; G. S. 1865, p. 444, sec. 8; R. S. 1879, sec. 675. (3) The real point at issue, as we conceive it, is whether the mere fact of the incumbrance not being capable of present enforcement would debar the plaintiff from removing it, and recovering the reasonable amount paid. That it would not, is, we think, abundantly established by the authorities cited. Sedgwick on Dam. 195 [4 Ed.] top and note; *Collier v. Gamble*, 10 Mo. 472; *Dickson v. Desire*, 23 Mo. 163. (4) Under a strict covenant of seizin it is necessary to prove an eviction, but under the covenant of indefeasible seizin or the covenant against incumbrances implied by the statute as amended in 1879, it is not necessary to prove an eviction. It is only necessary to prove that the estate conveyed has been defeated, or the right to defeat it has been extinguished, or the incumbrance removed. *Collier v. Gamble*, 10 Mo. 467; *Shelton v. Pease*, 10 Mo. 473; *Mosely v. Hunter*, 15 Mo. 322; *Dickson v. Desire*, 23 Mo. 151; *Walker v. Deaver*, 79 Mo. 664. (5) The damages for the breach of a covenant against incumbrances depends upon the value of the incumbrance without reference to the value of the land or the purchase money. The covenantee is entitled

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to recover what he has paid to extinguish the incumbrance if he has paid a reasonable and fair price. *St. Louis v. Bissell*, 46 Mo. 157; *Kellogg v. Molin*, 62 Mo. 429; *Henderson v. Henderson*, 13 Mo. 151. (6) The fact that plaintiff had parted with her title, at the time of the commencement of her suit, is immaterial as affecting her right to recover on the covenants. She was the owner at the time she removed the incumbrance. (7) The tax sale did not convey the dower. There are two theories upon that subject. The one is, that it is a proceeding against the land itself, and has nothing to do with the previous chain of title; that it is a breaking up of all previous titles. *Jones v. Devore*, 8 Oh. St. 431. The other, that it is a derivative title, the purchaser taking only such title as the party to the proceedings had. This court in construing the statutes has adopted the latter theory. *Gitchell v. Kreidler*, 84 Mo. 472; *Granby v. Casey*, 93 Mo. 595. Under a statute in almost the precise words of section 2197, Revised Statutes, 1879, it has been held by two eminent text-writers, that the laches of the husband in permitting his land to sell for taxes would not debar the wife of her dower. *Black. on Tax Titles* [2 Ed.] 549; *Scrib. on Dower* [2 Ed.] 809, 820.

GANTT, P. J.—This is an action on a covenant of warranty, made by appellant to the respondent, Mrs. Sarah C. Blevins. The land conveyed is the south half of the southeast quarter, section 6, township 46, range 25, Johnson county, Missouri.

The evidence showed title in appellant Smith, at the date of conveyance to respondent, except an outstanding inchoate right of dower in Mrs. Mary E. Collier, the wife of Daniel Collier. Appellant deduced his title from Daniel Collier, by virtue of a tax sale and deed under the act of 1877. It was admitted that Daniel Collier was still alive at the time of the commencement of the suit. After respondent obtained her

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deed from appellant, she attempted to mortgage the land and failed because of this outstanding inchoate dower right in Mrs. Collier. She thereupon purchased this right for \$150, and brought this suit against appellant for that amount.

Appellant assigns two grounds for reversal. One that the court erred in permitting respondent to recover more than nominal damages for the breach of the covenant by reason of the inchoate dower of Mrs. Collier remaining outstanding, and, secondly, that the court erred in not holding that the tax sale and deed conveyed the land absolutely, and by it Mrs. Collier's inchoate right of dower was entirely barred, and, of course, could constitute no incumbrance.

We all agree that the first contention of appellant must be sustained. While an inchoate right of dower is an incumbrance, as it is a contingency founded upon a contingency, it is not susceptible of computation by any definite rule; hence the practice has been adopted in this state to allow only nominal damages until the dower becomes consummate. *Walker v. Deaver*, 79 Mo. 664.

II. In regard to the second assignment, we think the court committed no error in holding that the tax proceedings did not divest Mrs. Collier's dower right. We shall not attempt to discuss the power of the legislature to collect taxes. We think it sufficient for the case in hand to ascertain, if we can, what the legislature has determined shall be the policy of the state.

In the first place, we have by statute adopted the common law in regard to dower. Lord COKE says: "There be three things highly favored in law, *life, liberty and dower*." Chief Justice MCKEAN, in *Kennedy v. Nedrow*, 1 Dallas, 438, asserts that "dower is a legal, an equitable and moral right. It is favored in a high degree by the law, and next to life and liberty held sacred."

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Strong as these terms are, they are strengthened by our statute. Section 4525. "No act, deed or conveyance executed or performed by the husband without the assent of the wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estate of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife, provided in the foregoing sections of this chapter," that is to say, the sections securing the widow her common-law and statutory dower. Now at common law, and by our statute reaffirming it, "the right of dower attaches whenever there is a seizin by the husband, during the marriage, of an estate of inheritance, and, unless it is relinquished by the wife in the manner prescribed by law, it becomes absolute at the husband's death."

"It is a right in law fixed from the moment the facts of marriage and seizin concur, and becomes a title paramount to that of any person claiming under the husband by subsequent act." *Grady v. McCorkle*, 57 Mo. 172. This then is *the character of the estate* that is to be divested by this *new* construction of the statute.

It is conceded that our statute requires "the owner" to be made a party before his or her interest in the lands can be affected by a tax proceeding under our act of 1877, and this section has been uniformly construed, so that *cestuis que trust*, mortgagees, remaindermen and incumbrancers, who are not made parties, are not affected by these suits. *Stafford v. Fizer*, 82 Mo. 393; *Corrigan v. Bell*, 73 Mo. 53; *Graves v. Ewart*, 99 Mo. 13. No lawyer will question that inchoate dower is an incumbrance. But it is sought to sustain this new doctrine on the ground that our tax proceedings, beginning with the assessment, *is a proceeding strictly "in rem,"* and we may remark here, that, only by *sustaining* this position, can this new rule be maintained.

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Beginning with *Abbott v. Lindenbower*, 42 Mo. 162, under a statute requiring the lands in all cases to be assessed to the person appearing to be the owner at the time of assessment, this court said: "It is unnecessary for us to say further here, what might be the effect of this last clause in any case, *but we may go so far as to declare now that an assessment in the name of a person who neither was nor ever had been the owner of the property would be an utterly void assessment.*" Our present statute requires the land to be listed and *assessed in the name of the owner*, if known. Under this statute in *Gitchell v. Kreidler*, 84 Mo. 472, Judge BLACK, speaking for the whole court, says: "While the judgment is against the property and not personal, still *the tax is assessed against the owner*, if known. The law *looks to him* for payment of the tax. * * * Such a proceeding cannot be said to be strictly *in rem.*" Blackwell on Tax Titles, 630.

It will serve no good purpose to cite authorities to the same effect. This has been the accepted construction of our tax laws for many years. Were it a proceeding strictly "*in rem*," there would be no such thing as collecting the tax on real estate out of personal property, which it is conceded may be done. Indeed, the whole system is based on the idea that *it is the duty* of the husband to pay the taxes on his land. And a failure to pay the taxes is a *default* on his part. The wife is under no obligation to pay the tax. She does not own the fee; she does not reap the usufruct; certainly no system based upon justice would exact of her a tribute on property she might never enjoy, and rob her of her dower for failure to pay a tax she did not owe. If then taxes become delinquent, whose default is it? Not the wife's, certainly.

But it is said, that because there can be no personal judgment for taxes, therefore, section 2197, Revised Statutes, 1879 (R. S. 1889, sec. 4525), cannot be invoked. It would be difficult to conceive of a statute that would

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protect a wife's dower if this is not sufficient. But we think this construction of this section too narrow. The injury is not confined to "judgments." The statute says in addition to "judgments or decrees, confessed or suffered," "*no laches, default, covin or crime* of the husband *shall prejudice* the rights of the wife." Is it not laches in a citizen to neglect or refuse to pay his taxes? Is not the word "delinquent," used throughout the statute, a synonym for laches and default? And could there be a sale of the land and a divestiture of the wife's dower but for this delinquency on his part? The proposition is too clear for argument.

But, if it is held that this section does not protect the wife's dower against the laches and default of the husband, we will have an anomalous state of affairs. A husband cannot, by deed or mortgage, the most solemn and praiseworthy, for the most valuable consideration, alien or destroy her dower right. No judgment against him, willing or unwilling, can affect her dower; no fraud, covin or crime, and yet he can suffer this new "*fine and recovery*," and successfully bar her dower, by simply refusing to pay his taxes and let the land sell, and thus a result is reached, by this simple device, that could not be compassed by the most skillful conveyancer. We cannot believe the legislature intended such result.

On the contrary, the whole scope of the tax act clearly shows that the tax law of 1877 was designed to furnish a method for collecting taxes, in which notice was given to the delinquent of the amount of his taxes, and a day in court, if erroneous, to show the error. When the judgment is entered, an execution issues, just as on other judgments, and it is intended to convey the *right, title and interest of the defendant who owned* the land, and whose duty it was to pay the taxes. Says Judge BLACK: "We have repeatedly held that the purchaser at these sales acquires, and *acquires only, the title and interest of the parties who*

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are made defendants." *Graves v. Ewart*, 99 Mo. 13; *Powell v. Greenstreet*, 95 Mo. 14.

An ordinary execution sale conveys to the purchaser all the right, title and interest of the defendant in execution, but it has no effect upon the inchoate dower of the wife. It was clearly the intention of the legislature to give the same effect to a tax deed, under regular and valid proceedings, that a deed under a general judgment would have; "no more, no less" "A tax title is a derivative title." *Gitchell v. Kreidler*, 84 Mo. 477. Says Judge BLACK again: "It must be taken as settled law that purchasers at these sheriff's sales, made on executions in tax suits, acquire *only the right, title and interest of the defendant in the tax suits.*" *Powell v. Greenstreet*, 95 Mo. 13; *Evans v. Roberson*, 92 Mo. 192.

No inconvenience has been felt in Missouri because in ordinary execution sales the wife's inchoate dower was not conveyed. Creditors and purchasers know her interest is fixed, and all business transactions are based upon that understanding. The state has adopted a most stringent policy in passing the fee-simple estate to the tax purchasers for the insignificant sum of the tax; a bagatelle, usually, compared to the value of the lands sold. While the state has a right to its revenue, no reason appears why it should take the dower of the unoffending wife and vest it in the tax speculator, thus giving him a vantage over all creditors and purchasers at all other execution sales.

We do not so read the statute. We regard the dower right as of *inestimable value* to the homes of this state. The trend of public opinion is rather to enlarge, as our homestead laws clearly indicate, than to cut off this sustenance of the widow. Instead of being a "shadow" it has proved a "pearl of great price" in thousands of ruined homes. Between the tax speculator and the defenseless widow, section 4525 of our

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statute of 1889 stands as a monument to the wisdom and humanity of our commonwealth.

Judge MACFARLANE concurs in this opinion. Judge THOMAS files his separate opinion, holding a different view.

SEPARATE OPINION.

THOMAS, J.—Daniel Collier owned the south one-half of the southeast quarter of section 6, township 46, range 25, west, in Johnson county, Missouri, and, at the time he so owned this land, a suit was instituted against him for taxes due thereon, which culminated in a judgment and sale of the land. The sale occurred on the eighteenth day of February, 1880, and A. H. Tuttle was the purchaser. The sheriff executed the proper deed for the land to Tuttle under this sale. By a succession of conveyances the defendant acquired all the title to this property that Tuttle acquired by virtue of the tax deed.

On the twelfth day of September, 1882, defendant sold the land to Sarah C. Blevins for a consideration of \$1,000, and gave her a warranty deed therefor, by which he covenanted with said Sarah C. Blevins to warrant and defend the title to this land "against the claim of every person whomsoever."

It was admitted that Mary E. Collier was the wife of Daniel Collier at the time of the assessment of the taxes and the institution of the suit, which resulted in the sale of the land for taxes. Sarah C. Blevins is the wife of her coplaintiff, W. R. Blevins. After she acquired the title to this property, she attempted to mortgage and sell it, but was unable to do so on account of the supposed existence of an inchoate right of dower in Mrs. Collier in it. She in conjunction with her husband then bought Mrs. Collier's interest and paid therefor \$150, taking a deed from her and her husband for it. They then sold the land to Wm. L. Gaston for \$900, and they bring this suit against defendant upon his covenant of warranty, and in the circuit court they obtained

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judgment for the amount thus paid Mrs. Collier for her inchoate right of dower, and defendant appeals.

Two controlling questions arise in this case: *First.* Is Mrs. Collier's inchoate right of dower in the land described cut off by the tax sale and deed? *Second.* Can there be any breach of a general covenant of warranty by the existence of an inchoate right of dower in the land?

The most important question is this: Did the tax deed made by the sheriff of Johnson county, to Tuttle, in 1880, divest Mrs. Collier of her inchoate right of dower in the premises, and will it operate to bar her dower in case she survive her husband, it being admitted that he is still alive?

This question has never been passed upon in this state, and we have, therefore, given it a most careful consideration. I am unable to find any reliable guides in the adjudications of other states on this subject; for local statutes have almost wholly controlled the determination of the question. I am hence driven to our own statutes and adjudications on the subject of taxation and sale of land for taxes, in order to arrive at a correct conclusion. I can use only general conclusions reached by text-writers and the decisions of the courts as illustrating the principles we announce. I will briefly refer to some of these. In the first place I will inquire into the general nature and extent of the power of taxation.

"The power to impose taxes," says Judge COOLEY, "is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it.

* * * No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life, than through the exactions made under it. Taxes are defined to be burdens or charges imposed by the

legislative power upon persons or property to raise money for public purposes. The power to tax rests upon necessity, and is inherent in every sovereignty." Cooley Con. Lim. [3 Ed.] 479.

The power to tax is analogous to the right of eminent domain. The same author in his work on taxation (p. 237) uses this language: "When the state has need of the property of citizens for its sovereign purposes, it may lawfully appropriate it against the will of the owner either under the power to tax or the right of eminent domain." Mr. Blackwell, on the same subject, says: "There is no difference in principle between the power of taking land for public use and the power to tax and enforce its collection by a sale of the land. In both cases the land is taken for the use of the public; they only differ in degree." 1 Black. Tax. Tit. [5 Ed.] sec. 99. A tax in legal contemplation is not a debt due by the owner of property. It is a charge levied upon the person or property of the citizen for a public purpose, by the state. *Carondelet v. Picot*, 38 Mo. 125; Cooley on Tax. 15; *In re Life Ass'n of America*, 12 Mo. App. 40. And imprisonment for the non-payment of taxes is not imprisonment for debt. Cooley on Tax. 17.

I will in the second place inquire into the general rule in regard to the sale of land for taxes, and the title acquired by the purchaser at such sale.

There are in the several states of this union two methods of listing lands for taxation. One is to list the lands "as the summation of all interests," and the other is to list the interest of the owners of the land as set out in the assessment roll. And much depends on the method of the assessment as to the interest that passes to the purchaser at a tax sale. Indeed, when the principles underlying the exercise of the taxing power and the sale of lands for unpaid taxes are examined it will be found that the title conveyed at a tax sale depends almost wholly on the theory upon which the land is listed and valued for taxation. On this subject Mr.

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Blackwell, in his work on tax titles [5 Ed.] section 954, says: "When the sale and deed are valid and have their complete effect * * * the interest conveyed depends upon the circumstances * * * and the statutes. *If a particular interest* in the land is separately assessed as such, a sale of that does not pass the *whole land*, nor will a sale of the land pass such interest. If the land alone is assessed *as the summation of all interests*, liens, incumbrances, etc., the general rule is that the deed carries a fee-simple, absolute, a new and independent title, the land itself being conveyed; and all prior liens, incumbrances and interests in, to or upon the land are extinguished. * * * In those states where the tax is a charge upon the land alone, where no resort in any event is contemplated against the owner or his personal estate, and where the proceeding is strictly *in rem*, the tax deed will undoubtedly have the effect to destroy all prior interests in the estate, whether vested or contingent, executed or executory, and those in possession, reversion and remainder. * * * On the other hand where the law requires the land to be listed in the name of the owner of the fee, or of any other interest in the estate, provides for a personal demand of the tax, and in case of default authorizes the seizure of the body or goods of the delinquent in satisfaction of the tax, and in terms, or upon a fair construction of the law, permits a sale of the land only when all other remedies have been exhausted, then the sale and conveyance by the officer pass only *the interest of him in whose name it was listed*, upon whom the demand was made, who had notice of the proceedings, and who alone can be regarded as legally delinquent. In such case the title is a derivative one, and the tax purchaser can recover in ejectment only such interest as he may prove to have been vested in the defaulter at the time of the assessment."

As we shall see, later on, the method of listing lands for taxation and the sale of them for unpaid

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taxes in Missouri does not come under either of the categories mentioned by Mr. Blackwell, but partakes of the nature of both somewhat.

Mr. Cooley in his work on taxation [2 Ed.] page 464, on this same subject, says: "The usual method of enforcing the payment of taxes upon property is by putting the property up at public sale. *No one* questions the right to do this, and *no one* doubts that the sale, if fair and made in compliance with the law, and after all necessary preliminary steps have been taken, vests a perfect title in the purchaser to the full extent that the statute *shall declare*."

With these general rules as lights to guide us, let us examine the statutes and decisions in Missouri in reference to this question.

The tax sale involved in this case was made under the revenue law first enacted in 1877, and which has substantially continued in force to this time. The title to the property was vested in fee in Daniel Collier, and he alone was made a party to the tax suit. Mrs. Collier not being made a party, the question is whether her contingent right of dower is barred by the tax proceeding, sale and deed. If it is, there can be no recovery in this case for breach of warranty.

The statute in force at the time the tax suit was instituted required the suit to be brought against the "owner" of the property. R. S. 1879, sec. 6837. Was Mrs. Collier an "owner of the property," within the meaning of that statute? Her right of dower at the time of these proceedings was and is yet inchoate only. McCLEAN, J., in *Johnston v. Vandyke*, 6 McLean, 422, says: "It is not easy to define the right of dower before the death of the husband." It is not only an inchoate right but contingent. "It depends upon the death of the husband. If he survive his wife, she has no right transmissible to her heirs, nor during the life of the husband can she give it any form of property to her advantage. * * * So long as the husband shall

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live, it is only a right in legal contemplation, depending upon the good conduct of the wife and the death of the husband. Until the death of the husband, the right, if it may be called a right, is shadowy and fictitious, and like all rights which are contingent may never be vested."

In *Moore v. City of New York*, 4 Seld. 110, the court says in speaking of the inchoate right to a claim for dower that it is a right "contingent upon the death of the husband. Such a possibility may be released, but it is not, it is believed, the subject of grant or assignment. It is not of itself property, the value of which may be estimated, but an inchoate right, which on the happening of certain events may be consummated so as to entitle the widow to demand and receive a freehold estate in the land."

Mr. Scribner in his work on dower says: "Although, therefore, an inchoate right of dower cannot be properly denominated an *estate* in lands nor indeed a *vested* interest therein, and notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may nevertheless be fairly deduced from the authorities, that it is a substantial right possessing, in contemplation of law, the attributes of property, and to be estimated and valued as such." 2 Scrib. on Dow., p. 8.

If I understand the rulings of this court, however, on the subject it is not conceded that this contingent right of the wife is capable of being estimated and valued. In *Hinds v. Stevens*, 45 Mo. 209, Judge BLISS, in discussing the effect of a partition proceeding on this right, says: "If the land be divided in specie, her inchoate right attaches at once to the land thus set apart to the husband in severalty; and, if it be sold, I know not how it would be possible to so estimate the value of that shadowy right, as to pay her or invest for her any portion of the proceeds of the sale." And in *Durrett v. Piper*, 58 Mo. 551, the court, through

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WAGNER, J., says: "A dower interest upon the part of the wife, whilst the husband is living, is an inchoate and contingent right. Its value depends wholly upon the death of the husband * * *. It is a mere possibility which may be released, but cannot be the subject of grant or assignment. The covenant being for an indemnity against a claim of dower, it is obvious that no breach could happen till the contingency arose which would legally vest in the wife a valid or substantial claim."

From all the authorities I conclude that the wife is not the owner of *any estate* or *vested right* in the property of which her husband is seized. But she is the owner of a contingent interest to dower, however; and the question is, whether the owner of such a contingency in real estate is an owner of property in such a sense as to require that she be made a party to a tax suit in order to bar that right. In our revenue laws, the word "owner" is used several times. Section 6706, Revised Statutes, 1879, provides that the assessor shall list land in numerical order "with the owner's name, if known, and, if not, then the name of the original patentee," etc.; and if the land cannot be listed numerically then he shall describe it as briefly as he can, giving the "owner's name if known," etc. By section 6834, the clerk of the county court is required to make a "back-tax book" and insert therein "a correct list in numerical order of all tracts of land and town lots on which back taxes shall be due, * * * setting forth opposite each tract of land or town lot the name of the owner, if known, and, if the owner thereof be not known, then to whom the same was last assessed.

It is provided by section 6837, that "all actions commenced under the provisions of this chapter shall be prosecuted in the name of the state of Missouri, at the relation and to use of the collector, and against the owner of the property; and all lands owned by the

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same person or persons may be included in one petition." Section 6853 provides that "each tract of land or lot shall be chargeable with its own taxes, no matter who is the owner, nor in whose name it is or was assessed or advertised."

I have thus set out in detail the provisions of the revenue laws in which the word "owner" occurs to enable us to determine what was meant by it; for it is a well-established canon of statutory construction that where the same word is used more than once and in different connections it must be held to have the same meaning in all, unless it be *manifest* it is used in different senses. Now, what did the general assembly mean when it required the assessor to place the name of the "owner" opposite each tract of land or town lot on the assessment roll? It will scarcely be claimed that the *wife* of the owner is included in that term as used in *this* connection.

And the same may be said of the provision in regard to the making of "the back-tax book." The word "owner," as used in *that* connection, would not include the wife of a man who held the legal title. If the word "owner" does not include the wife, having simply an inchoate right of dower, when applied to the assessment roll and the "back-tax book," neither will it include her, when applied to a section of the *same* statute requiring suit for taxes to be brought against the "owner." She cannot be regarded as an owner of property, of which she is seized, within the meaning of any of the provisions of the revenue laws quoted, and hence for that reason she is not a necessary or proper party to an action to collect taxes on the land of her husband.

But she was not a necessary party for another reason. This court has frequently held that the word "owner" as used in these laws does not necessarily mean the *actual* owner. The collector is not bound to go beyond the record to ascertain the owner of property,

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against whom to bring suit, and a purchaser at a sale for taxes against the person appearing from the record to be the owner will take the title in fee as against the true owner, whose deed or title is not of record, if such purchaser has no knowledge of the unrecorded title.

Vance v. Corrigan, 78 Mo. 94; *State ex rel. Hunt v. Sack*, 79 Mo. 661; *Evans v. Robberson*, 92 Mo. 192; *Allen v. Ray*, 96 Mo. 542.

The records of the county in which the land is situated do not always, nor usually, give the name of the wife, and the revenue officers cannot get the names of the wives in making assessments or in instituting proceedings for the enforcement of the state's lien for taxes. Hence, if the statute in terms required the collector to make the wives of the owners of land parties to the proceedings to collect the taxes it would be impracticable in a very large proportion of cases for him to comply with the requisition.

Having determined that the wife is not an owner of the property of her husband in such a sense as to require her to be made a party to an action to enforce the lien for taxes against his land, it seems this ought to dispose of the case; for when the suit is brought against the owner, and the proceeding is regular, the purchaser gets a title "in fee" to the land sold. And as to the meaning of an estate in "fee," Mr. Tiedeman in his work on real property, section 36, says: "The word 'fee' without any qualifying adjective implies an *unlimited* estate of inheritance. Such is also the case with the term 'fee simple' and 'fee simple absolute.' The three terms 'fee,' 'fee simple' and 'fee simple absolute' may be used interchangeably; the adjectives in the last two are surplusage." See, also, *Allen v. McCabe*, 93 Mo. 138.

The lien of the state for taxes is a "first lien on the land." This lien attaches to the *res*, and is paramount to every interest and estate in the land as well as to all other incumbrances, whether prior or subsequent.

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Gitchell v. Kreidler, 84 Mo. 472. And a sale to foreclose this lien in an action where all owners of the land within the meaning of the statute have been regularly made parties "digs up," as it were, the "fee" and vests it in the purchaser. *Jones v. Devore*, 8 Ohio St. 430; *Osterberg v. Trust Co.*, 93 U. S. 424; Cooley on Tax. [2 Ed.] 445, and cases cited.

I have not lost sight of the doctrine laid down by this court in the case of *Gitchell v. Kreidler*, 84 Mo. 472, that the title acquired by a purchaser at a tax sale under our statute is a derivative one. This I do not deny, but we hold that when all of the owners of the land taxed, within the meaning of our revenue laws, are made parties to the suit, a perfect title passes to the purchaser under these laws, because it is provided that a title in "fee" shall pass. Cooley on Tax. [2 Ed.] 464. In the same case in which Judge BLACK declares that a tax title under our statutes is a derivative one, he is careful to say also that the judgment in these cases is *in rem*.

But it is contended that a judgment against the husband for the taxes cannot affect the wife's inchoate right of dower, and section 2197, Revised Statutes, 1879, is quoted in support of this contention. That section is as follows: "No act, deed or conveyance, executed or performed by the husband, without the assent of the wife, evidenced by her acknowledgment thereof * * * and no judgment or decree confessed by or recovered against, him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife provided in the foregoing sections of this chapter."

This is chapter 29, entitled "of dower." Plaintiffs denominate the failure of Collier to pay the taxes on the land and permitting judgment to go against it for them as "laches" on his part, within the meaning of the word as used in the section quoted.

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Mr. Blackwell in his work on tax titles [5 Ed.] section 961, holds that a sale for taxes does not cut off the inchoate right of dower under a similar statute in Illinois, and he quotes several cases as authority for that position; but on examination it will be found that not a single case he quotes involved the sale of land for taxes. In the most of them it was held that an execution sale under a judgment against the husband *for debt* did not bar dower, either consummate or inchoate. There is no doubt about the soundness of that position. That is the unquestioned law in Missouri. This writer announces the same doctrine again in section 954, but his reference is to section 961 of his own work above as authority for it. It is not easy to determine Mr. Blackwell's meaning, when it is a recognized principle even by himself, that the state can sell the property of the citizen for the payment of taxes either by a direct proceeding against the owner, or against the *rem*, or against both, and convey a title in fee to the purchaser. 1 Black. on Tax. Tit. [5 Ed.] sec. 75, *et seq.* and sec. 954; Cooley's Con. Lim. [3 Ed.] 402; Cooley on Tax. 672. We presume he does not intend to announce the doctrine that the state cannot sell the inchoate right of the wife to dower in her husband's real estate, by any process whatever. He intended, no doubt, to simply state the rule to be that in order to bar this right the wife must in some way be made a party to the proceeding. We can hardly conceive that the "shadowy" right of dower of the wife, while her husband is living, can be regarded as any more sacred than the vested estate of the husband.

In section 954, *supra*, he states the doctrine to be that where the state assesses and sells the land irrespective of any particular owner's interest in it "the tax deed will undoubtedly have the effect to destroy *all prior* interests in the estate, whether *vested* or *contingent*." And Mr. Cooley says in the extract above

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quoted that "*no one doubts that the sale if in compliance with law vests a perfect title to the purchaser to the full extent that the statute shall declare.*"

That the legislature has the power to divest by a proceeding of this character the wife's inchoate right of dower is well settled upon principle and authority. Cooley on Tax. [2 Ed.] 444; Black. on Tax Tit., secs. 138, 954; Cooley on Con. Lim. [3 Ed.] 360; 2 Scrib. on Dow., p. 8, *et seq.*; Woerner's Am. Law Adm'r, 112; *Massoson v. Rice*, 29 N. W. Rep. 168; *Jones v. Devore*, 8 Ohio St. 430.

Let us examine section 2197, *supra*, and see if a judgment for taxes where the husband alone is made a party to the action is within its scope and meaning. That section provides that "no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right of the wife" to dower. The decree or judgment here referred to does not apply to a judgment for taxes. There can be no *personal* judgment for taxes. The judgment must be against the land. *State v. Sargeant*, 76 Mo. 557; R. S. 1879, sec. 6838. Hence, the judgment in this case was not "confessed by nor recovered against" Collier. The judgment was rendered against the land, and a special execution ordered for the sale of that. The state obtained judgment and sold the land against the will of Collier. The judgment did not grow out of any contract of Collier. The section quoted was intended to prevent the husband doing anything, either actively or passively, to bar dower, without the consent of his wife. A tax proceeding is a proceeding *in invitum*.

The revenue laws of Missouri require that the land itself, and not the interest of any particular owner, be valued for taxation, and that taxes be levied on the land. *Allen v. McCabe*, 93 Mo. 138. In the first place, the assessor is required to list the land and set opposite each tract or town lot the name of the owner, if

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known. In the second place "the back-tax book" must contain a list of the tracts of land and town lots with the names of the owners, if known, set opposite to them. In the third place the judgment must state the amount of taxes due on each tract of land or lot and "shall decree that the lien of the state be enforced, and that the real estate or so much thereof as may be necessary to satisfy such judgment, interest and costs be sold, and a special *fiери facias* shall be issued thereon, which shall be executed as in other cases of special judgment and execution, and said judgment shall be a first lien upon said land." Sec. 6838, *supra*. Here it is required that the judgment shall not only be against the land but the taxes must be decreed against the tract or lot on which they have been levied. "The state has no lien upon one lot for taxes charged against another, although both lots are owned by the same person. *State ex rel. v. Sargeant*, 76 Mo. 557. In the fourth place the statute provides that the land is chargeable with the taxes levied thereon "no matter who is the owner nor in whose name it is or was assessed." Sec. 6853. And in the fifth place the sheriff shall, after the sale of land for taxes, make a deed "which shall convey a title in fee to the purchaser of the real estate therein named."

Construing all these provisions together it is manifest that the proceeding under our laws for the sale of lands for taxes is essentially a proceeding *in rem*. 2 Black. on Tax Tit., sec. 954; Cooley on Tax. [2 Ed.] 527. It is true the tax when levied is made a personal charge against the owner of the property assessed, and may be collected by the seizure and sale of his personal property, and the owner must be made a party to the action for the recovery of taxes due on land; yet when it is sought to sell the land itself the proceeding is confined strictly to the establishment of a lien against it, and no personal judgment is permitted against the owner not even for costs, though known and a party to

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the suit. *Milner v. Shipley*, 94 Mo. 109; *State ex rel. v. Sargeant*, *supra*. It seems anomalous, too, that the collector can seize and sell the personal property of the person *he* supposes is the owner, but that no personal judgment can be rendered against the owner when he is brought before the court, and it has been judicially determined who the owner is; but this is nevertheless true as is apparent from the plain letter of the statute and the adjudications of this court.

In *Watt v. Donnell*, 80 Mo. 195, it was held that the tax books were not evidence to show even *prima facie* who the owner of the land is. Under this ruling, it would appear difficult for the collector to make any demand and especially any seizure of personal property for a land tax.

It is clear that the judgment or decree referred to in section 2197, *supra*, means a judgment or decree *against the husband* founded upon some act, contract, tort or fraud of his and does not embrace a judgment obtained by the state *in rem*, in the exercise of its paramount power of taxation or eminent domain.

It seems to have been uniformly held by the courts of this country, when this question came before them, that where lands are appropriated by the exercise of eminent domain the dower of the wife, though she be not a party to the proceeding, is barred. *Moore v. New York*, 4 Sandf. (N. Y.) 456. In this case the land had been condemned for public use, and the full value paid to the husband, the wife not being made a party to the proceeding. The court said: "The question which is here presented is, whether a wife has such an interest in the premises owned by the husband, while her right of dower is inchoate, as can be divested by this act of the legislature and the proceedings under it. * * * The right being merely an incident to the marriage relation, it seems to us that while this right is thus inchoate, and before it has become vested by the death of the husband, any regulation of it may be made by the legislature, though

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its operation is, in effect, to divest the right, the marriage relation itself being within the power of the legislature to modify or even abolish it. The power of the state to take private property for public use results from its right of eminent domain, and that power is not restricted except by constitutional provisions, that just compensation shall be made to the owner. In this case the husband was deemed *to be the owner of the entire estate* in the land, and the inchoate right of the wife was not considered by the commissioners, and we think justly so, as the subject of estimate as to its value separate from his. Indeed, the value of her interest, such as it was, would seem to be scarcely capable of being estimated as a separate interest. We see no reason to doubt that the commissioners were right in considering the entire estate in these lands as vested in the husband, and he having been paid the full value for them, the corporation by force of the act became seized of the lands in fee simple absolute, discharged of any claim of dower of the wife therein."

The case went to the court of appeals of New York, and was there affirmed. 8 N. Y. 110. GARDINER, J., who delivered the opinion of the latter court said: "The estate of the widow after assignment of dower is a continuation of the estate of her deceased husband. It follows, that while living *he, as owner, is entitled to and represents the entire fee.* This the statute vests on confirmation of the report of the commissioners and concludes all those entitled to the land, and all other persons whomsoever. Mrs. Moore, at the time of the proceedings to appropriate the real estate, was not, as we have seen, entitled to it, but her husband; and she was concluded by the general language of the act.

* * * Dower is not the result of contract but a positive institution of the state founded on reasons of public policy. In the case under consideration the land was taken against the consent of the husband, by an act of sovereignty, for the public benefit. *The only person*

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owning and representing the fee was compensated by being paid its full value. The wife had no interest in the land, and the possibility which she did possess was incapable of being estimated with any degree of accuracy."

The inchoate right of dower may be barred not only by the state in its exercise of the right of eminent domain, without consulting the wife, but the husband also can by his own act bar this right by a dedication of his property to public use when the dedication is complete or when the public accepts the dedication. This point was ruled by the supreme court of Indiana in *Duncan v. City of Terre Haute*, 85 Ind. 104.

Judge DILLON, in his treatise on municipal corporations [2 Ed.] section 459, says: "As dower is not the result of contract, but is a positive legislative institution, it is constitutionally competent for the legislature to authorize lands to be taken by a municipal corporation for a market, street or other public use, upon an appraisalment and payment of their value to the husband, *the holder of the fee*, and such taking and payment will confer an absolute title divested of any inchoate right of dower. Nor is the widow *dowable in lands dedicated by her husband* in his lifetime to the public, where the dedication is complete, or has been accepted and acted upon by the municipal authorities."

On the same subject Mr. Washburn in his work on real property [4 Ed.] page 269, uses this language: "One mode in which dower may be defeated remains to be mentioned, and that is by the exercise of eminent domain during the life of the husband, or what is equivalent to it, the dedication of land to the public use."

In *Gwynne v. The City of Cincinnati*, 3 Ohio, 24, the husband gave the city a square for a market house and a street opening to it. His wife did not join in this dedication. The city ordinance accepted this dedication. The supreme court held that the wife was barred. It is there said: "The counsel for complainants insist

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that it is a case to be distinguished from that of public grounds for public uses, but the court are unable to comprehend the distinction. When a town is laid out, the law requires the plat to be recorded, and by such record the streets become public highways, and the title to the grounds set apart for public uses is vested in the county for the purposes contemplated. The uses thus created are inconsistent with the exertion of any private right while the use remains; consequently, all private rights must be either suspended or abrogated. Such has been the general understanding, not only in this state, but also as far as we are informed in other states also."

Mr. Scribner, in his work on dower, after reviewing the adjudged cases in England and America, and after an examination of the principle involved, concludes the discussion of this question thus: "The rule fairly deducible from these authorities would seem to exclude dower in all cases where lands are dedicated to the public for a legitimate purpose, and the public have acquired a right to the enjoyment thereof, or where they are lawfully appropriated in virtue of the right of eminent domain. The reasoning of the courts appears to apply as well where lands are granted and used for public parks, public libraries or other public use of a like character, as where they are devoted to the purposes of a market place or a public highway." Scrib. on Dow., chap. 27, part 7.

Let us examine this question now, in the light of the Missouri statutes and decisions.

We have a chapter, and have had for many years, providing for the dedication of streets and grounds to the public. R. S. 1889, ch. 127. The statute authorizes the proprietor of land to make, acknowledge and file a plat on which shall be designated the streets and grounds dedicated to the public, and that such plat, when acknowledged by the proprietor and recorded, "shall be a sufficient conveyance to vest the fee of such

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parcels of land as are therein named, described or intended for public uses in such city, town or village when incorporated in trust for the uses therein named." R. S. 1889, sec. 7313. No provision whatever is made for the concurrence of the wife in the dedication; but the authorities we have quoted would seem to indicate that such dedication, when accepted by the public, would operate to bar the inchoate right of dower of the wife of the "proprietor," where she does not join in the dedication.

Our road laws and laws in regard to eminent domain provide for the appropriation of land for the public use, but no provision is anywhere made to obtain the inchoate right of dower of the wife of the owner of the land which is appropriated. The statutes on these subjects do not look beyond the husband, when he is seized of the fee. Though the question has never been directly involved in any case determined by this court, yet Judge BLISS in *Maguire v. Riggins*, 44 Mo. 512, *loc. cit.* 515, quotes and approves the doctrine of *Moore v. New York*, *supra*.

By common consent among the people and members of the bar of this state, it has not been deemed necessary to make the wife a party to a proceeding to condemn her husband's land for a public road or a railroad in order to cut off her inchoate right of dower. This common opinion in this instance has so long prevailed in Missouri, and has been so universally acted upon, that its overthrow now would introduce great confusion in the titles to estates. It is not merely speculative and theoretical, but has been made the groundwork and substance of practice. The presumption is that this practice is founded upon the rule announced by Scribner and Washburn and the cases quoted above.

Again, it has been held in this state that where the wife joins with her husband in a mortgage of his real estate, she is not a necessary party to a suit to foreclose the mortgage, and that a foreclosure against the husband

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alone bars her inchoate right of dower. *Riddick v. Walsh*, 15 Mo. 519; *Thornton v. Pigg*, 24 Mo. 249; *Hoyt v. Oliver*, 59 Mo. 188.

It is true that in the *Riddick-Walsh* case the foreclosure occurred at a time when our statute provided that a sale under a general execution against the husband carried the wife's dower; yet Judge Scott did not rest the determination of the case wholly upon the statute, but held that the foreclosure carried the dower without regard to the statute. He uses this language: "On the one hand it was argued that as the land out of which this right of dower is claimed had been sold under a special *feri facias* on the judgment in the mortgage proceedings, that was a sale under execution within the meaning of the act, and, therefore, the right of dower was barred. On the other hand, it was contended that the wife was a necessary party to the proceedings to foreclose the equity of redemption, and, not being joined, she could not be affected by the judgment in a suit to which she was not a party. There is a marked distinction throughout the books between cases where a suit affects a wife's interest in real estate, which is claimed in her own right, and those in which she has only an inchoate right of dower. In the former class of cases no instance is to be found in which it is not maintained that a wife is a necessary party to the proceedings in order to divest her right. In the latter class the husband alone is deemed the proper party to defend a proceeding instituted to divest the title to land to which a mere inchoate right of dower has attached. * * * The execution of the mortgage, with the wife's acknowledgment and relinquishment of dower, the proceedings to foreclose the equity of redemption, the judgment, execution and sale by the sheriff, taken with his deed, are the links in the chain of title of the purchaser at the sheriff's sale. The wife, having given her assent to the deed and having a mere inchoate right in her husband's estate, who was still in existence, and he

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being competent to defend such interests of the wife in all other proceedings against him, no reason is perceived why the wife should have been made a party to this suit. So in either point of view the wife is barred of her dower."

The doctrine laid down in this case was directly involved in the case of *Thornton v. Pigg*, *supra*, decided in 1857, and was approved by this court. And again, in 1875, the same doctrine received the sanction of this court in *Hoyt v. Oliver*, *supra*.

In 1855 the question arose in *Lee v. Lindell*, 22 Mo. 202, whether a judgment of partition against the husband divested the wife's inchoate right of dower, and it was distinctly held by a majority of the court that it did. And it was also held that section 2197, which was then in force, did not affect the question. In other words it was held that a judgment in partition against the husband was not included in that section. Judge SCOTT, who delivered the opinion of the court, said: "There being no law requiring her to be made a party, it is not perceived how the arbitrary use of her name can impart validity to a proceeding, which without it would not affect her. Nothing seems clearer than that, if the law does not require a married woman to be made a party to a proceeding, the making her one arbitrarily cannot affect her rights. If the proceeding is such as does not bind her, the use of her name without authority of law cannot produce such a consequence. Under our law, the wife of the husband, who owns an interest in the land to be divided, is not required to be made a party in partition, no more than such wife is required to be plaintiff or defendant in an action of ejectment for lands claimed by the husband, and in which she may have a right of dower. If the husband alone is competent to protect her interests in this action why not in other actions in which her interests are the same?" And *Riddick v. Walsh*, *supra*, is cited as authority.

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The general principle upon which this decision proceeded was that the wife's interest was subordinate and subject to the right of partition, and for that reason she was not a necessary party. The same question arose again, and was again determined the same way in 1870, in *Hinds v. Stevens*, 45 Mo. 209. The opinion this time was unanimous. This case goes further, however, than that of *Lee v. Lindell*. The judgment in the *Hinds-Stevens case* was rendered against the husband in his lifetime but the sale did not occur till after his death, when his widow applied for her dower, she not having been made a party to the proceeding. Judge BLISS delivering the opinion of the court said: "Since the decision of this court in *Lee v. Lindell*, 22 Mo. 202, it has never been deemed necessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition. The statute does not expressly require it, and I cannot conceive of any interest she can have in the result more than in any other suit touching the realty. * * * The very broad language in relation to parties to proceedings in partition was substantially the same, in the statute of 1835, under which *Lee v. Lindell* was decided, as in that of 1855, covering the proceeding in question." Since this decision the question has not been mooted in this state.

In 1875 in the case of *Hoyt v. Oliver*, *supra*, it was held that a wife was not a necessary party to a suit to correct a deed of trust given on the land of the husband.

In the case of *Bailey v. Winn*, 101 Mo. 649, it was held that a wife was not a necessary party to an action to foreclose a vendor's lien in order to bar her dower. See, also, *Fountain v. Sav. Inst.*, 57 Mo. 552; *Duke v. Brandt*, 51 Mo. 221.

Where the husband has taken a title bond for land, and paid part of the purchase money, his wife has an inchoate right of dower in the land thus held. *Hart v. Logan*, 49 Mo. 47; and yet, in such case, if the

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husband's interest be sold under a general execution the inchoate right of dower is barred (*Worsham v. Callison*, 49 Mo. 206); and the husband alone in such case can transfer the property and bar his wife's right to dower. *Duke v. Brandt*, 51 Mo. 221.

It seems clear that the reason of the rule, applicable to the exercise of eminent domain and the dedication of land to public use, to the foreclosure of mortgages and vendor's liens and to partition proceedings, applies to the case at bar with great force. When the state appropriates the land of a private citizen for public use, it does it against his will. So when the state enforces its lien against the land of the citizen it does it against his will. If one proceeding cuts off the inchoate right of dower, why does not the other? In case of foreclosure of a mortgage or vendor's lien the husband and wife both are interested to show first that nothing is due, and, in the second place, they have a right to receive the surplus. This court has said that the husband is competent in that case to protect the interests of his wife. In the case at bar the husband and wife were interested, first, to show that no tax was due on the land, and, in the second place, they had a right to receive the surplus arising from the sale after the satisfaction of the lien. In the proceeding instituted against him to enforce the state's lien for the taxes, was he not competent to protect his wife's interests? Was he not, as remarked by GARDINER, J., in *Moore v. City of New York*, *supra*, "the only person owning and representing the fee?"

If a judgment in partition against the husband bars the wife's dower, *a fortiori* will not a judgment enforcing the state's lien for taxes, when the husband is made a party bar her dower? In a partition proceeding the wife is peculiarly interested. It is said her dower will attach at once to the land allotted to her husband in severalty, but may not land be allotted to him that is unimproved, and hence be utterly valueless

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to the widow? She has no right to be heard in regard to whether partition shall be made at all, or in regard to what land shall be allotted to her husband. And if the land be sold the proceeds go to her husband, and she is cut off entirely. But still this court has held, and the rule is now firmly established, that the husband is competent to protect his wife's interests in such a proceeding. If that be the rule where the husband *may* on his *own* motion commence the proceeding, with how much greater force will it apply in a case where the state sells the land against the will of the husband as well as the wife? It is true no one shall be deprived of his property without "due process of law." But a proceeding *in rem* in which no named person is served with notice is due process of law. Cooley, Con. Lim. [3 Ed.] 402; Cooley on Tax. [2 Ed.] 51.

A proceeding defended by one person who represents another is due process of law. This was held in the cases we have cited, not probably in so many words, but in effect. A good illustration of this principle is to be found in the administration of estates. The administrator or executor is the only necessary party to establish a debt against the estate of the testator or intestate, though the debt thus established may finally operate to deprive the heir of the property he would otherwise take. Yet he is bound by the judgment against the administrator or executor. And where the mortgagor dies the administrator or executor is the only necessary party defendant in a proceeding of foreclosure, and a judgment against him not only bars the widow but the heir also. *Tierney v. Spiva*, 97 Mo. 98.

The owner in fee of land represents his heirs as well as creditors in all actions involving the title to the land. In such actions he *represents* the "fee," and this includes every one who will derive title through him. If he is competent to protect those who will be his heirs as also his creditors, whose interests are vastly superior, as a rule, to a wife's inchoate right of dower, is he not

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competent to protect his wife's interests? The dower right of a widow is a continuation of the husband's estate. "Her dower interest whether inchoate or consummate is part of the fee." *Doty v. Baker*, 11 Hun, 222; *Moore v. New York*, *supra*.

There is no provision in the revenue laws for making the wife a party to the action against the land of her husband, and as was said in *Lee v. Lindell*, in the absence of such a provision, making her a party arbitrarily cannot affect her interests. It being provided that the "title in fee" shall pass to the purchaser under a tax judgment, and no provision being made for bringing in the wife, it is the plain intent of these laws to pass not only the husband's interest but the wife's also, where he alone is sued. *Cooley on Tax*. 464.

The courts, in all the instances named, where the wife's inchoate right of dower was held to have been cut off by a proceeding to which she was not a party, have proceeded upon the general principle that this contingent right was subordinate to other rights—that the wife's right attached subject to a superior claim. So a tax lien in our state being paramount to all interests and claims, the wife's inchoate right of dower attaches subject to that lien, and she is no more a necessary party to a proceeding to foreclose it, in order to bar the right, than she is a necessary party in the instances referred to.

From the authorities cited, and from what has been said in this opinion, I deduce these propositions:

First. That when an action is brought against the owner of land within the meaning of that word as used in our revenue laws, to establish and enforce the state's lien thereon for taxes, a valid judgment rendered, the land sold thereunder and the sheriff executes a deed to the purchaser, *the whole title in fee is conveyed*, as the statute declares. *Second.* That the wife is not an "owner" within the meaning of the statute, by virtue of her inchoate right of dower in her husband's land in

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such a sense as to require her to be made a party to a tax suit against her husband, in order to bar her contingent interest. *Third*. That the husband in such case *represents the fee*, and is competent to protect his wife's interests, and hence, *fourth*, that a valid tax sale of the husband's fee-simple estate cuts off the wife's inchoate right of dower.

II. This is the conclusion I have reached upon an examination of the authorities, but I am equally well satisfied that this conclusion is sound upon principle also. It is to the interest of the state, of course, that it should have the power to collect its taxes by the sale of land, and to thereby convey the title in fee; but it is of vastly more importance to property-owners that the proceeding to sell lands for taxes should in the first place be as inexpensive as practicable, and in the second place that the interest and title offered for sale should be *definitely* known. Suits for taxes are expensive at best; but to require the wife to be made a party with the husband would add to that expense. Frequently the tax is only a dollar or two, and it would cost that much or more to make the wife a party. And when she is made a party, what can she accomplish more than her husband can accomplish? Nothing. His interests are identical with hers. The state, in its efforts to enforce the collection of the tax, is the common enemy of both. The proceeding is *in invitum* as to both.

But, when lands are offered for sale against the will of the owner, it is important to the owner that the estate offered should be definitely known; otherwise it will be sacrificed. If the title and estate offered for sale be known with certainty, the land will probably bring its value. If the collector be required to make the wife as well as the husband parties to the suit in order to bar her dower, in ninety-nine-hundredths of the tax sales, it will not, it cannot, be known whether there be a wife at all or not, and hence there will be a doubt as

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to the extent of the title conveyed. Sacrifices of land must follow necessarily, and these sacrifices will largely exceed the value of the "shadowy" right of inchoate dower. It is a well-known fact that nearly all tax suits are against non-resident owners, and, in such cases, it is utterly impracticable to learn the name of the wife of the owner, or to know that the owner is married. Sacrifices of property must result from the enforcement of such a requirement, and these sacrifices will generally exceed the value of the contingent right of inchoate dower. It is said, the sale of land for taxes is against common right, and is not, therefore, favored in law. That is true. But it is a common saying that "taxes and death" are certain. Every property-owner knows that an annual tax will be levied on his property. He knows or ought to know when it becomes due in each year, and the sooner it is known that, if the taxes be not paid within the prescribed time, the property will be sold and the owner will lose his property. This rule would be better for the state and better for the taxpayer. Better for the state because it would be sure to collect its taxes, and better for the owner, because, when he knows payment will be enforced certainly, he will be more apt to pay, and if for any reason he should fail to pay the taxes due by him, and his property be sold to pay them, it would bring its full value, when it is known that a good title in fee is to be conveyed. Hence, all embarrassments thrown in the way of tax sales simply operate to make taxpayers careless in the first place about the payment of their just share of the expenses of the state, and in the second place to sacrifice the property sold because no one can know definitely what is offered for sale. It should be the policy of the state to create competition at these sales, so that there may be a surplus left after the payment of costs and taxes, to go to the owner. *Cooley on Tax.* [2 Ed.] 464.

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III. The second contention on the part of the appellant is that there was no breach of the covenant of general warranty in this case at the institution of this suit, nor now because there existed only a right of inchoate dower in Mrs. Collier, and no breach could occur till this right became consummate and vested by the death of her husband. It is universally held that inchoate dower constitutes an incumbrance on land, and the rule is that the covenant is broken as soon as made in such case. This breach, however, is technical only, and the trial court committed error in giving judgment for substantial damages. *Walker v. Deaver*, 79 Mo. 664, and cases cited. Enough has been said in the former part of this opinion to show that this right of inchoate dower is too shadowy and unsubstantial to be valued or estimated.

I am of opinion that the case ought to be reversed without remanding.

104	619
105	108
104	619
48a	578
104	619
66a	295
104	619
135	172

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IN BANC.

Prohibition: PRELIMINARY ORDER IN VACATION: SUPREME COURT.

A judge of the supreme court may in vacation issue a preliminary order returnable into court to show cause why a writ of prohibition should not be issued.

Prohibition.

MOTION TO QUASH ORDER TO SHOW CAUSE OVERRULED.

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Frank M. Estes, Willis H. Clark and T. P. Bashaw for relator.

(1) A preliminary rule of prohibition may be properly issued by a judge in vacation. Lloyd on Prohibition, ch. 9, secs. 1, 2, 3; *Iveson v. Harris*, 7 Ves. 251; 4 Inst. 81; *Mayo v. James*, 12 Gratt. 17; *Ex parte Ray*, 45 Ala. 15; *Ex parte Boothe*, 64 Ala. 312; High on Extra. Rem., sec. 785; Addison on Torts [Wood's Ed. 1881] sec. 1462; Const. Mo., art. 6, secs. 3, 12; Const. Mo., secs. 5, 8, amendment to art. 6; *State ex rel. v. Weeks*, 93 Mo. 499. (2) The court of appeals has no final or conclusive jurisdiction in cases involving the construction of the constitution of the state of Missouri. Const. Mo., art. 6, secs. 2, 3, 12; Const. Mo., secs. 5, 6, 8, amendment to art. 6; *State ex rel. v. Court*, 41 Mo. 44; *Thomas v. Mead*, 36 Mo. 248; *Vitt v. Owens*, 42 Mo. 512; *Trainer v. Porter*, 45 Mo. 336; *State ex rel. v. Court*, 97 Mo. 279; *State ex rel. v. Francis*, 95 Mo. 44; *Nall v. Railroad*, 97 Mo. 68; *In re McDonald*, 19 Mo. App. 370; *Ex parte Boenninghausen*, 21 Mo. App. 270; *State ex rel. v. Seay*, 23 Mo. App. 623; *State ex rel. v. Blakemore*, 104 Mo.; *State ex rel. v. Macklin*, 104 Mo.; *State ex rel. v. Lewis*, 76 Mo. 370; High Extr. Legal Remedies [2 Ed.] sec. 781; *Quinbo Appo v. The People*, 20 N. Y. 531; *State v. Ridgell*, 2 Bailey, 560; *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315; *Mastin v. Sloan*, 98 Mo. 252; *State ex rel. v. Burckhardt*, 87 Mo. 533; Addison on Torts [Wood's Ed. 1881] sec. 1456.

Given Campbell and O'Neil Regan for respondents.

THOMAS, J.—The question now involved in this case has received our consideration, and we adopt the opinion of BARCLAY, J., as the opinion of this court sitting *in banc*, and order judgment to be entered accordingly.

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We will add that our attention has been called to the statement made by Lloyd in his work on prohibition, page 5, as follows: "A writ of prohibition must be moved for in open court, and a judge at chambers has no power to grant it either in term or vacation." It is evident Mr. Lloyd here refers to the practice in the courts of common law, for on page 4 of the same work he uses this language: "The court of chancery may also grant a prohibition in all cases when the common-law courts are not sitting, for the court of chancery has power to grant a prohibition in vacation as well as in term time." And again on page 58 he says, "but the application to the court of chancery in vacation need not be made in open court, but the cursitor will, on a proper affidavit, grant a writ returnable into the queen's bench or common pleas."

By virtue of the provision in our constitution vesting all judicial power "as to matters of law and equity" in the courts of the state in the exercise of its original jurisdiction in prohibition, in the absence of any statute on the subject, this court may "shape its proceedings in such form as will preserve the effectiveness of the ancient remedy administered by the superior courts, either of law or chancery, in the common-law system of jurisprudence.

The judges of this court, having the combined powers of a chancellor and common-law judge, have authority to do what either might have done under the old system, in respect of this writ. SHERWOOD, C. J., and BARCLAY, GANTT and MACFARLANE, JJ., concur; BLACK and BRACE, JJ., dissent.

BLACK, J. (*dissenting*).—This is an application for a writ of prohibition against the judges of the St. Louis court of appeals.

On presentation of the petition to one of the judges of this court, he made a vacation order or rule upon the respondent to appear at the term of this court next following the date of the order, and show cause why the

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writ should not be granted. The respondents have filed a motion to quash the order, on the ground that the judge had no authority to make it, and this presents the only question to be noticed at this time.

The constitution gives this court power to issue, hear and determine writs of *mandamus*, etc., and other original remedial writs, and the late amendment says this court "shall have a superintending control over the courts of appeals by *mandamus*, prohibition and *certiorari*." The statute recognizes the right of a judge to issue an alternative writ of *mandamus*, and hence a judge of this court may issue such a writ returnable to court in session. But we have no statute which gives, or even recognizes, the right of a judge to make a vacation order to show cause in prohibition. Indeed, we have no statute regulating the procedure in such cases, except that the chapter of the practice act relating to amendments is made to apply to proceedings in prohibition. R. S. 1889, sec. 2116.

If a judge of this court has any power or authority to make the vacation rule, it must be found to exist at common law, for in the absence of any statute on the subject the principles and usages of common law must govern. Acts of parliament, passed during and subsequent to the fourth year of the reign of James I., have no force and effect in this state (R. S. 1889, sec. 6561), and hence I cannot see what the English statutes cited in the majority opinion have to do with the question in hand.

A prohibition is a writ issuing properly only out of the court of king's bench, being the king's prerogative writ; but, for the furtherance of justice, it may now also be had in some cases out of the court of chancery, common pleas or exchequer. 3 Bla. 112. The account which Blackstone gives of the proceeding shows that it was inaugurated in court and not before a judge; nor is there anything to be found in the mode of procuring the writ, as laid down by Lloyd, which gives any

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countenance to the proposition that a judge could make the rule *nisi* in the vacation of the court. Lloyd on Prohib. 65. Indeed, that author says on page 5: "A writ of prohibition must be moved for in open court, and a judge at chambers has no power to grant it either in term or in vacation." A very full and complete enumeration of the powers of a single judge at chambers is given in 3 Chitty's Practice, beginning at page 19; and I find nothing there which leads to the conclusion that a judge at chambers could issue a rule to show cause in prohibition, unless that power was given by statute. Such an order does not appear to belong to those "minor and practical proceedings," which a single judge could make independently of any legislative authority, under the practice prevailing in the English courts.

It should be remembered also that judges of the courts in this state have never been supposed to possess the powers exercised by a single judge of the English high courts at chambers.

In the cases of *State, etc., v. Judge, etc.*, 22 La. Ann., 581, and in *State, etc., v. Judges*, 35 La. Ann. 1075, the court found statutory and constitutional authority for one of the judges to issue in vacation provisional writs of *mandamus* and prohibition. Those cases, in my opinion, furnish no authority whatever for the conclusion reached and asserted in the majority opinion. "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation except such as are expressly authorized by statute." 12 Am. & Eng. Encyc. of Law, 14. As I understand the law, a judge of this, or any other, court in this state can make those orders in vacation, and those only which some statute says he may make.

There may be some virtue in the plea of necessity put forth and pressed in the majority opinion, but it is

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a plea which should be addressed to the legislature and not to this court.

In my opinion the motion to quash should be sustained. Judge BRACE agrees with me in what I have said.

DIVISION ONE.

BARCLAY, J.—A verified petition for a writ of prohibition was presented by relator to one of the judges of the supreme court, during vacation thereof, upon consideration of which, the judge made an order upon defendants, composing the St. Louis court of appeals, to appear at the opening of the next ensuing term of the supreme court to show cause why the writ prayed should not be issued. On the opening of the following term, a motion was made to quash the preliminary vacation order as being unauthorized by law.

The petition for prohibition proceeded on the theory that the St. Louis court of appeals had no jurisdiction to entertain or adjudicate upon an original information in the nature of a *quo warranto* (then pending before it) against the present relator, the decision of which cause (as was alleged) involved a construction of the constitution of this state.

The duty has been assigned me of giving expression to our views on the question which this case presents, namely, whether a proceeding in prohibition, may be begun during vacation, by an order of one of the judges to defendants, to show cause to the court (at its following session) why the writ should not be issued.

The constitution confers original jurisdiction upon the supreme court to issue writs of prohibition, and to hear and determine the same (Const. 1875, art. 6, sec. 3; Amendment of 1884, sec. 8); but no procedure for the exercise of such jurisdiction is prescribed by the fundamental law or by any statute whatever.

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Without a general review of the history of the writ, it may be well at this point to remark that under the system of jurisprudence, from which ours is derived, a prohibition could be obtained from the superior courts of common law in term time, and from the court of chancery in vacation as well as in term. There is general unanimity among text-writers on this point. 2 Chitty's Prac., pp. 406, 338, 355; Lloyd on Prohibition, chap. 9, sec. 3, p. 58; Shortt on Mandamus and Prohibition, 427; 1 Wooddesson's Lectures, 85, note *e*; 1 Maddock's Chancery, 12.

This jurisdiction of chancery was expressly placed on the ground of necessity and was exercised for the avowed purpose of preventing in this regard a failure of justice during the vacation of the law courts. It was so well recognized that the adjudications refer to it rather incidentally than directly, but the remarks of the judges clearly show that the power was unquestioned. *Iveson v. Harris* (1802), 7 Vesey, 257; Lord ELDON in *In re Bateman* (1870), 9 Eq. Cas. L. R. 660; *Saunderson v. Claggett* (1720), 1 P. Wms. 663; *Montgomery v. Blair* (1804), 2 Sch. & Lefr., star p. 136, Lord REDESDALE; *Re Foster* (1857), 24 Beavan, 428; *Anon.* (1718), 1 P. Wms. 476.

Such a writ was sometimes issued from chancery, returnable into one of the superior courts of common law when the nature of the case appeared to require it. *Blackborough v. Davis* (1701), 1 P. Wms. 43.

It was a general maxim of English law that for every wrong there should be a remedy (Broom's Leg. Max., star p. 4191), and at a very early day it was expressly declared by the statute of Westminster II., that "Whosoever, from thenceforth a writ shall be found in the chancery, and in a like case, falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one; and, if they cannot agree, it shall be adjourned till the next parliament, where a writ shall be

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framed by consent of the learned in the law, lest it happen for the future, that the court of our lord the king be deficient in doing justice to the suitors."

Later the same notion of the proper functions of courts, embodied in the last lines of that statute, found more positive expression in the language of Magna Charta: "To none will we sell, to none deny, to none delay, right or justice."

During the prevalence of such conceptions of law it is not wonderful that the idea, that such a necessary remedy as prohibition could lie in abeyance, at any time, never took shape. On the contrary the writ was obtainable somewhere, always, and the tendency of legislation in England has invariably been in the direction of increasing rather than impairing the facilities for its use. 1 Wm. IV. (1831), chap. 21; Petty, Bag. Act. 12 & 13 Vict. (1849), chap. 109; *Amstell v. Lesser* (1885), 16 Q. B. Div. L. R. 187.

It played a very important part in the historic struggle of the English people to maintain the supremacy of the common law against the encroachments of jurisdiction on the part of the ecclesiastical courts, and was found extremely effective in keeping the latter within their constitutional limits. In the earliest authentic records of English precedents occur repeated illustrations of its employment for that purpose.

To these facts probably may be traced the idea of its importance prevailing among English-speaking peoples which has taken shape in the western hemisphere in repeated constitutional assurances of its fixed place in jurisprudence, declarations intended to secure to the citizens of these states the protection which it gave at the common law against possible usurpations of judicial authority.

Our own constitution, besides recognizing this writ, asserts in the bill of rights, following the lead of Magna Charta, that: "The courts of justice shall be open to every person, and certain remedy afforded for

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every injury to person, property or character, and that right and justice should be administered without sale, denial or delay." Const. 1875, art. 2, sec. 10.

Though we have no statute dealing directly with the remedy in question, nevertheless there are some general provisions of law which appear to cast light on the subject of this discussion and should be noted.

"Sec. 3243. All courts shall have power to issue all writs which may be necessary in the exercise of their respective jurisdictions, according to the principles and usages of law." R. S. 1889.

"Sec. 8951. All writs and process, issued by any judge or justice of the peace or other officer authorized to issue the same, shall run in the name of the state of Missouri, and be subscribed by the officer issuing the same." R. S. 1889.

From these sections it is evident that the legislative department supposed that judicial power (or at least so much thereof as might be necessary to lay a foundation for effective action later by the court in due course) might occasionally be lawfully exerted in vacation.

This idea is yet more definitely expressed in statutes which plainly declare or imply that orders of injunction (R. S. 1889, sec. 5488), writs of *mandamus* (R. S. 1889, sec. 6811), *supersedeas* (R. S. 1889, sec. 2286) and *habeas corpus* (R. S. 1889, sec. 5346) may be issued in vacation by a single judge, though there is no express authority therefor in the constitution, which vests the judicial power in the "courts" as such.

The statute relating to *mandamus* declares that: "Where any writ of *mandamus* shall be issued out of any court in this state, or by any judge thereof in vacation, directed and delivered to any person, who, by law, is required to make return of such writ, such person shall make his return to the first writ of *mandamus*." R. S. 1889, sec. 6811.

It will be noted at a glance that this language does not purport to confer authority on a single judge to

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issue an alternative writ in vacation. It refers to that authority merely by way of recital, clearly implying the existence of such power already. That section simply recognizes that existing power; and it has been expressly held, in a recent and unanimous opinion of this court, that the issuance of such a writ by a single judge in vacation is not beyond the constitutional grant of power to this "court" to "issue, hear and determine" the writ of *mandamus*. *State ex rel. Sharp v. Weeks* (1887), 93 Mo. 499.

The grant of authority to courts in this state includes "matters of both law and equity." Const. 1875, art. 6, sec. 1. This court, therefore, in the exercise of original jurisdiction in prohibition, in the absence of any statute on the subject, may, and, we think, should, shape its proceedings in such a form as will preserve the effectiveness of the ancient remedy administered by the superior courts, either of law or chancery, in the common-law system of jurisprudence. Compare *Wilcox v. Wilcox* (1856), 14 N. Y. 575; *Brown v. Snell* (1874), 57 N. Y. 299; *State v. Merry* (1833), 3 Mo. 278.

To do less would be to disregard the obvious purpose of the statute which declares that "the supreme court, in addition to the powers conferred by the constitution, shall have power to direct the form of writs and process, not being contrary to or inconsistent with the laws in force for the time being." R. S. 1889, sec. 3278.

This section has been the law since a very early day in Missouri (Act of January 7, 1825, concerning "courts;" R. S. 1825, p. 268, sec. 3; R. S. 1835, p. 155, sec. 7; 1865, p. 541, sec. 2), and it may be instructive to mention further in this connection, that during the existence of a separate chancery court (before its jurisdiction was merged in the present courts) it was provided that, "The said superior court of chancery and circuit courts shall be considered as always open for granting injunctions, writs of *certiorari* and other process

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usually granted in vacation." Act of December 8, 1820; 1 Terr. Laws Mo., p. 703, sec. 9.

The English court of chancery, as has been already shown, had the undoubted right to set on foot proceedings in prohibition, during the vacation of that court or of the other courts, by process appropriate to the emergency. In molding the procedure of to-day to meet the exigencies of justice that fact cannot be ignored.

The ancient practice in prohibition was somewhat complicated and incumbered with fictions. 3 Black. Com., star p. 112; *Arnold v. Shields* (1837), 5 Dana, 18. It need not be described here as it is obsolete in England (1 Wm. IV. (1831), ch. 21, sec. 1), and the American practice has conformed to the later English.

The initial step in modern proceedings, upon a proper petition (in the nature of a suggestion) for such relief, is an order to the defendant to show cause why the writ should not be granted. Such order adjudicates no right. It is merely a necessary preliminary, designed to bring the matter into court for adjudication. As was said by the supreme court of Louisiana in *State ex rel. Behan v. Judges* (1883), 35 La. Ann. 1077, "it is merely an incipient step toward a judicial investigation of the matters and complaints urged in the application; it can be modified or recalled by the authority whence it emanates." A writ of summons, in an ordinary action, serves a similar purpose. Although the court is the repository of judicial power under our constitution, it has never been supposed that its clerk might not lawfully be invested with authority to issue a writ of summons in vacation, to bring the defendant before the court in term having jurisdiction to determine the cause.

Independently of legislation and by the sanction of long usage, the judges of the superior courts of England exercised a very extensive jurisdiction at chambers over many minor proceedings, both in vacation and in term

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time. This practice probably originated, as one learned author observes, from the overflow of business of the full court in term, "and in the vacation from the absolute necessity for some tribunal having power to interfere and relieve from the consequence of the abuse of the process of the court, or of irregularities, as by illegal arrest, or execution under irregular or insufficient proceedings, under which, otherwise, a party might continue in imprisonment, or his goods be irretrievably sold under an execution, sometimes without any redress, or at least not otherwise redeemable until the next term."

The same author continues on this subject thus: "The authority of a judge at chambers to make orders in the various cases which are brought before him is, when considered upon principle, the authority of the court itself; his order may be considered as an *inceptive* act of the court; he ought never to make such order, unless from his experience in the practice of the courts he knows that it is most probable that the majority of the court would afterwards, if appealed to, ratify such order. And although the order is usually obeyed from respect, or fear of its being afterwards enforced and disobedience punished, yet no order which is made can be enforced by attachment until it has been first made a rule of the court, and the party who disputes the propriety of the order has an opportunity to question its validity by application to the court. And, although an order has been acquiesced in and acted upon, still it must be made a rule of court before an attachment can be obtained for disobeying its directions." 3 Chitty Prac., pp. 19, 20.

It is not to be inferred from the presentations of these quotations from the source indicated, that we suppose the judges of our courts, generally, possessed of such inherent powers at chambers or in vacation as were the English judges. In the main, the powers of the former are regulated by plain laws, constitutional

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or statutory; but in the present instance we are compelled to deal with a subject in which the general "principles and usages of law" (R. S. 1889, sec. 3243) must guide us to some conclusion, and to reach a just one it is necessary to consider what official action the judge of a court may properly take in vacation toward making the action of the court itself effective according to the "principles and usages" referred to.

The observation of Mr. Chitty that a preliminary order of the judge in vacation is, upon principle, properly referable to the authority of the court itself, finds support in this state in a very late case wherein the act of a circuit judge in vacation, in appointing a receiver for a partnership, was considered and held a lawful and proper exercise of the jurisdiction vested in the court itself, sustainable on the ground of the inherent power of the latter, in all matters of equity, and not dependent upon any statute. *Greely v. Bank*, 103 Mo. 212.

Bearing in mind the purpose of the writ of prohibition, its history and the existing condition of the law here, should we suppose that the constitution of our state designed to limit the scope or diminish the occasions of its usefulness as recognized in the English law? It would seem not. Yet if it be held that no judge of the court during its vacation has authority, according to the "principles and usages of law," to make a rule upon a defendant to show cause in such a case, it would follow as a necessary consequence that, during the greater part of the year, no step whatever could be taken toward utilizing this useful writ, however great the urgency for its interposition.

It is an established rule of construction of fundamental, as well as of other, laws, that the effects and consequences of any proposed interpretation of it may properly be considered to ascertain what was probably the intention designed to be expressed therein. *State v. Hope* (1889), 100 Mo. 361. Applying now that rule, we note that the larger part of the business of this

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court is performed by the judges while the full court stands adjourned, and "vacation," in its application to all courts, and their officers, is construed, by statute, "to include any adjournment of court for more than one day." R. S. 1889, sec. 6570. So that if no one were authorized in "vacation" to make the preliminary order to show cause essential to institute such a proceeding, it would follow, in many instances of wrongs attempted under the forms of law, that our people would be without the means of preventive relief which in similar circumstances might have been given at common law. No court surely would adopt a construction involving such a denial of justice in many cases, unless the law to that effect was too clear to permit of any other; for an intent to produce such results could not fairly be imputable by construction to intelligent law-givers.

On the contrary, the fact that such consequences would follow is a solid premise from which to argue that no such construction was within the meaning and intent of the constitutional language giving the power to issue the writ.

Many states of fact can be readily conjectured wherein prohibition would be the only remedy that could be afforded for the relief of a party entitled thereto. When we consider the facility with which it might have been obtained at common law, and how its efficiency would be paralyzed by limiting its use merely to cases that could be instituted while the full court was in session, we think it must logically follow, from the very necessity of the case, that the original order in this cause should be sustained as the appropriate form of process to effectively begin such a proceeding. *State ex rel. v. Judge* (1870), 22 La. Ann. 581.

It is a general rule of law which has passed into a maxim, that a grant of power or jurisdiction is supposed to tacitly imply a grant of that without which the grant itself would be ineffectual. Broom's Legal Maxims

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[8 Am. Ed.] star pp. 479, 486. Thus, where an English statute gave a justice jurisdiction over an offense, it was held to impliedly give him power to issue process to apprehend anyone charged with such offense. *Bane v. Methuen* (1824), 2 Bing. 63.

As was said by Sir FREDERICK POLLOCK, C. B., in *Smeeton v. Collier* (1847), 1 Ex. 462: "Where the legislature simply gives a power to the court, it is to be taken that the court receives all the ordinary powers necessary for that purpose." And in *State v. Ryno* (1887), 49 N. J. L. 603, it was declared that "the right to hear and decide the cause necessarily implies authority to use the process provided by the law to bring in the parties."

The rule is especially applicable to constitutional grants of power, since such instruments are not designed (and usually do not attempt) to furnish details of procedure, but merely express, briefly, the general nature of the power to be exercised.

We think the jurisdiction given to this court to issue, hear and determine writs of prohibition includes as a necessary and essential incident of that jurisdiction, according to the principles and usages of law, a power in each judge thereof, during its vacation, to issue a preliminary order to show cause, returnable into court, as the necessary process to initiate the proceeding.

It follows that the motion to quash the order made herein should be overruled, and that defendants be directed to show cause to this court, as therein required, within ten days from the service of this order. SHERWOOD, C. J., concurs; BLACK, J., dissents. BRACE, J., is of opinion that, as the decision will involve a point of general practice in the court, the cause should be certified to the court *in banc*, which latter order is accordingly made with the concurrence of all the judges of this division.

The State v. Ballard.

THE STATE V. BALLARD, *Appellant*.

DIVISION TWO.

1. **Criminal Practice : VARIANCE : EXCEPTIONS.** Under Revised Statutes, 1879, section 1820, the objection of variance between the charge in the indictment and proof of the description of anything named therein must be specially raised in the trial court and exceptions thereto duly saved.
2. ——— : **FAILURE OF PROOF.** Where, however, the evidence shows a total failure of proof of defendant's guilt, the supreme court will review the same, although the attention of the trial court was not specially called thereto.
3. ——— : ———. The evidence in this case examined and held to show an entire failure of proof that defendant was guilty of the larceny of the cow as charged.
4. ——— : ———. The evidence in a criminal case which merely raises a suspicion of guilt is insufficient to sustain a conviction.

Appeal from Carter Circuit Court.—HON. J. G. WEAR,
Judge.

REVERSED AND REMANDED.

C. D. Yancey for appellant.

(1) This is a case of total failure of proof, and for that reason the judgment should be reversed. (2) The court as appears from the record wholly failed to instruct the jury, which was reversible error. *State v. Banks*, 73 Mo. 568; *State v. Palmer*, 88 Mo. 592; 10 Mo. App. 111; 16 Mo. App. 556.

John M. Wood, Attorney General, for the State.

(1) The court before which the case was tried did not find that the variance, if any, between the description of the cow as described in the indictment and as

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described in the evidence and between the name of "William Bowman, Sr.," as charged in the indictment, and "William Bowman" as testified by the witness, was material to the merits of the cause or prejudicial to the defense of defendant. The statute governs this, and the variance was immaterial and did not entitle defendant to an acquittal, and does not authorize the reversal of this case. R. S., sec. 4114; *State v. Baker*, 64 Mo. 282; *State v. Bibb*, 68 Mo. 286; *State v. Hammond*, 77 Mo. 157; *State v. Smith*, 80 Mo. 516, and other cases cited. (2) It does not appear from the record that the court wholly failed to instruct the jury as contended by appellant, but it does appear that the instructions were not incorporated in the bill of exceptions and they must, therefore, be presumed to be correct. However, this is not one of the grounds assigned in the motion for a new trial. *State v. Reed*, 89 Mo. 168; *State v. Burk*, 89 Mo. 635; *State v. Emory*, 79 Mo. 461; *State v. Preston*, 77 Mo. 294. In fact the motion states that the court erred in giving instructions. (3) Really the only point properly saved and assigned in the motion for a new trial is, that the evidence was insufficient to sustain the verdict. The record wholly fails to sustain this contention. The testimony clearly established defendant's guilt, and the judgment should be affirmed.

MACFARLANE, J.—Defendant was indicted for the larceny of "one red brindle, white, line back cow," the property of William Bowman, Sr.

William Bowman testified that a "red and white spotted, line back cow" was taken away or missed from his cattle on the twenty-third of October, 1885. Henry Detmers, a butcher at Piedmont, testified that in October or November, 1885, he bought between three and five head of cattle from defendant. One was a red and white spotted cow." She was marked in the right ear, standing before the cow. She had been newly marked and had a chain about her horns.

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Defendant offered to pay Bowman for the cow. Bowman asked him, "Why he wanted to pay for the cow if he had not taken her. He said he wanted to get out of it, and not have the name of it."

Defendant testified that in October, 1885, he sold five head of cattle to Detmers in Piedmont; one was a "red and white pieded cow" he bought from John Martin about the same time.

Defendant did not incorporate in his bill of exceptions the instructions given or refused by the court, and we must presume that no error was committed in its instructions to the jury.

The only question appearing upon the record about which any doubt arises is, whether the evidence was sufficient to justify the conviction. If the proceeding was according to the common law, the variance between the charges in the indictment and the proof offered in their support would have been fatal.

Though it would not be necessary, in an indictment for stealing the domestic animals made by the statute subject of grand larceny, to give specific description of such animals stolen, when such description is given it will not, in proceedings at common law, be treated as surplusage but must be proved substantially as alleged. Wharton Crim. Ev., sec. 146; *Benson v. State*, 1 Tex. App. 7; *Hubotter v. The State*, 32 Tex. 483.

The common law has been greatly modified by section 1820, Revised Statutes, 1879, which provides that variance between the charge in the indictment, and the evidence offered in proof thereof, in the description of any matter or thing whatever therein named or described, "shall not be deemed grounds for an acquittal of the defendant unless the court, before which the trial shall be had, shall find that such variance is material to the merits of the case and prejudicial to the defense of the defendant."

This statute was designed to remove all purely technical objections on account of variances which do

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not prejudice the substantive rights of the defendant. Under this statute objections on account of variance must, in the first instance, be specially addressed to the trial court, and its action in ruling on the question can only be reviewed upon exceptions saved at the time. Such objections cannot be raised for the first time in the appellate court. The record fails to show that the matter of variance was brought to the attention of the trial court, and it cannot be considered here.

It is insisted also that there was not only a variance between the allegations and proof, but a total failure of proof that defendant was guilty of the larceny of the cow belonging to Bowman, as charged in the indictment. This contention, we think, well founded. The variance between the description of the cow as given in the indictment, and that of the cow proved to have been stolen, would not avail defendant unless the circuit court found that such variance was prejudicial to him. In this case, however, the only proof that defendant ever had the cow, alleged to have been stolen, in his possession was that of the butcher who testified that about the time of the loss of the cow he bought one from defendant. Bowman describes the cow as a "red and white spotted, line back cow," while the cow found in the possession of defendant was described as a "red and white spotted cow." There was no other identification of the cow stolen with the cow in defendant's possession than the description thus given of them. The "lined back" was the descriptive flesh mark of the stolen cow. This noticeable mark does not appear as a characteristic feature of the cow defendant sold, as described by the butcher. The evidence was barely sufficient to raise a suspicion against defendant that he sold the cow Bowman lost.

No one should be convicted of a felony on a mere suspicion of his guilt. Judgment reversed and cause remanded.

The State v. Morrison.

THE STATE V. MORRISON, *Appellant*.

DIVISION TWO.

1. **Criminal Law: NEGLIGENCE SHOOTING: MANSLAUGHTER.** Where one carelessly handles a loaded shotgun, and without examining to see whether it is loaded, points it at another, and unintentionally, but negligently, and with a recklessness incompatible with a proper regard for human life, shoots him, he is guilty of manslaughter in the fourth degree.
2. **Criminal Practice: DEFENDANT AS WITNESS: INSTRUCTION.** Where on a trial for murder defendant has testified in his own behalf, it is not error to instruct the jury that they *should* consider the fact in weighing the evidence, that defendant is the prisoner on trial.

Appeal from Greene Circuit Court.—HON. W. D. HUBBARD, Judge.

AFFIRMED.

Goode & Cravens for appellant.

(1) The court erred in giving instructions based on the theory of either murder in the first or second degrees. (2) The court erred in giving instructions, numbered 6, 8 and 9 for the state. (3) This case is easily distinguishable from *State v. Emery*, 78 Mo. 77, and cases cited in that case.

John M. Wood, Attorney General, for the State.

(1) As defendant was only convicted of manslaughter, instructions as to murder will not be reviewed by this court. *State v. Wilson*, 98 Mo. 440. (2) The instructions of the court correctly declared the law as to manslaughter in the fourth degree, resulting from the unintentional killing of a human being by the act, procurement and culpable negligence of another. *State v.*

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Emery, 78 Mo. 77. (3) An instruction as to the credibility of the witnesses, the same as instruction, numbered 7, given by the court on the part of the state in this case, was approved in the case of *State v. McGee*, 85 Mo. 647. (4) The eighth instruction as to the credibility of defendant's testimony is correct. *State v. Cook*, 84 Mo. 40. (5) The ninth, as to statements made by defendant, is more favorable to defendant than the usual instruction upon that point. *State v. Vansant*, 80 Mo. 67. (6) The instruction as to dying declarations is correct. *State v. Vansant, supra*. (7) The eleventh instruction, that good character does not justify an acquittal, properly declares the law. *State v. Kilgore*, 70 Mo. 546. (8) The twelfth, as to the punishment for manslaughter in the fourth degree, and the thirteenth, as to reasonable doubt, are correct. (9) The instructions given by the court fairly and properly presented the whole case to the jury; the other instructions asked by defendant were embraced within those given, and were properly refused. *State v. Smith*, 80 Mo. 516; *State v. Walton*, 74 Mo. 270.

GANTT, P. J.—The defendant was indicted in the circuit court of Greene county for murder in the first degree, for shooting and killing Miss Julia Patterson, on the fourth of May, 1886. He was convicted of manslaughter in the fourth degree, and his punishment assessed at a fine of \$500.

Defendant at the time was a boy about sixteen years old. Miss Patterson was a young lady employed as a domestic in defendant's father's family, in Springfield, Missouri, at the time she was killed. The shooting occurred in the evening near sundown, in the house of Dr. Morrison, the father of defendant. No one was present in the house at the time but Miss Patterson, the deceased, and defendant.

George Morrison, a cousin of defendant, the only person near enough at the time to hear anything more

than the report of the gun, was in a building near by, some sixty-five feet distant. Immediately after the report he heard her exclaim, "Oh, Theo, I am ruined," and heard the defendant say, "I didn't know the gun was loaded, Julia; I didn't think there was anything in it." He went in immediately, and as he went in defendant came out hurriedly going for a physician. When George reached Miss Patterson he assisted and supported her. He found her left thumb partly shot off, a slight wound in her arm, and a gunshot wound penetrating her right breast, into the cavity of the chest. She stated to him, and to the friends who came in immediately, and to the physicians that it was an accident. Afterwards, and after she had given up all hope of living, and indeed as to this she seemed impressed from the beginning that she could not possibly recover, and so expressed herself, she made a detailed statement of the shooting as follows: She was out on the porch reading the recipe book, and she said when she got through with that she thought she would go and get the bible, and when she started into the library to get the bible, Theodore came into the room at an opposite door, at another door in this room, and met her with the gun, and she said when she first saw it, she thought it was a curtain pole but as he advanced nearer she saw it was a gun; he was pointing it at her, like he was aiming to shoot her. She said he pointed it at her and looked like he was aiming it at her left breast, and she said she turned and threw up her hand to try to shield herself, and he shot her.

The defendant was sworn in his own behalf. He testified substantially the same as others, to the impaired condition of the gun, and its use as a plaything for months in its unloaded, broken and harmless condition; that there had been no ammunition for a long time about the house which could be used in it, even if in repair; that he knew nothing of his brother Douglass having the cartridge which young Thompson

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had given him. Knew nothing about the gun having been loaded by his brother, and had no reason to suppose that there was any load in the gun; that he had no ill feeling of any sort against the girl; that he went in, on the occasion referred to, for no other purpose than to get the gun to have "some fun" with his brother with it; that he found the hammer on the shelf and took it and the gun into his mother's room, and got the screw-driver from the machine-drawer, and screwed it on, resting the muzzle of the gun on his foot while he did it, and snapped the gun several times in that position; that the hammer was broken in such a way that it would hardly ever strike the plunger when snapped, and then only very imperfectly; that, after he had screwed the hammer to its place, he took up the gun, and, still holding it in a horizontal position in both hands, turned to go through the double door, which was hung by heavy curtains, into the library, snapping it as he went, when greatly to his consternation it suddenly went off; that it fired just as the deceased entered the room from the hallway, on the other side; that he never saw her nor did he know she had left the porch until the very moment the gun went off; that he was not conscious of having intentionally pointed the gun at her even in sport; that her appearance into the room and the sudden discharge of the gun were both so unexpected and he was so startled and shocked at what occurred in that moment that he did not know whether he in sport pointed the gun at the girl or not, but, if he did, it was but a flash through his mind, and he has never been conscious of intentionally directing the gun at her for any purpose.

There was evidence of general good character; also evidence that the gun was old and unreliable; that the hammer was too short to hit the plunger right; the end of the hammer was broken off. There was no certainty about the gun firing. It was also in evidence that a

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brother of defendant had loaded the gun without defendant's knowledge.

There were some statements of defendant to other boys that he did it intentionally ; but one of them was evidently a joke, and the other highly improbable to say the least. The whole case, fairly considered, seems to be another example of the silly and inexcusable habit of pointing guns at people without intending to shoot them, and as usual resulting in death.

All questions of murder in either degree are out of question. The only matter for consideration is the propriety of the verdict for manslaughter, based upon the culpable negligence of defendant and the giving of certain instructions for the state.

The sixth instruction, given by the court at the instance of the state, is as follows: "6. If you find from the evidence that in a room of the dwelling-house of defendant's father, in the said county of Greene, on or about May 11, 1886, the defendant was carelessly handling a loaded shotgun, and that he saw the deceased, Julia Patterson, near him in said dwelling-house, and that, without examining to see whether the gun was loaded or not, he presented or pointed it toward her, and shot her, inflicting on her body a mortal wound as described in the indictment, and that she died of said wound in May, 1886, and if you further believe from the evidence that said shooting was not intentionally done by defendant, but was the result of his negligence in handling the gun, and of a recklessness and carelessness on his part, incompatible with a proper regard for human life, then you will find defendant guilty of manslaughter in the fourth degree under this indictment."

This instruction was a proper direction to the jury under the facts of this case. It does not, as counsel for defendant seem to think, impose an unlawful burden on defendant. It is a simple declaration of the law that it is culpable, criminal negligence to point a gun at a

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human being without having either known it was not loaded or taken some precaution to ascertain it was not loaded. In requiring this much of defendant the court only announced what the law for the protection of human life demands. We find no error in this instruction.

Nor did the court commit any error in giving the eighth instruction, in telling the jury they should consider the fact that the defendant was the prisoner on trial in weighing his evidence. *State v. Cook*, 84 Mo. 40; *State v. Young*, not reported.

There is nothing in the objection to the ninth instruction. It has been approved time and again in this state. No instruction as to defendant's good character was asked or given for the state, and the tenth instruction asked by defendant was given just as prayed. We do not see the force of such suggestions in a brief. The thirteenth instruction given by the court on reasonable doubt is one approved by this court in *State v. Nueslein*, 25 Mo. 111, and more recently in *State v. Young*.

On the part of the defendant the court submitted to the jury the question of defendant's culpable negligence in the fullest and fairest manner. His responsibility was limited to one of his age and discretion; and he was only to be convicted after the jury found him guilty of culpable negligence. We do not see how the trial court could have been any more indulgent than it was. The defendant has no just ground of exception. The jury were fully justified in finding the verdict they did.

And no error appearing we affirm the judgment of the circuit court of Greene county. All the judges of this division concur.

The State v. McCaskey.

THE STATE V. MCCASKEY, *Appellant*.

DIVISION TWO.

1. **Criminal Law: SEDUCTION UNDER PROMISE OF MARRIAGE: CORROBORATING EVIDENCE.** On a trial of an indictment for the seduction of a woman under promise of marriage, she must, under Revised Statutes, 1879, section 1912, be corroborated as to the promise by other evidence than that given by herself.
2. ——— : ——— : **GOOD REPUTE.** The duty is on the state in such case to allege and prove that she was a woman of good repute.
3. **Criminal Practice: INSTRUCTIONS.** Instructions should not refer the jury to the indictment to determine what they must find in order to convict.

Appeal from Polk Circuit Court.—HON. W. I. WALLACE, Judge.

REVERSED AND REMANDED.

A. A. Underwood and B. J. Emerson for appellant.

(1) There is no evidence that prosecutrix was of previous chaste character or good repute. This being a material element of the crime, it was necessary for plaintiff to have so proven affirmatively. *State v. Hill*, 91 Mo. 423; *People v. Roderigas*, 49 Cal. 9; *West v. State*, 1 Wis. 186; 3 Crim. Law Magazine, 338, *et seq.*; R. S., sec. 1254; *State v. Patterson*, 88 Mo. 88. (2) The indictment cannot be sustained upon the uncorroborated evidence of the prosecutrix. The promise must be proved by other testimony than her own. This is wanting. *State v. Hill, supra*; *Polk v. State*, 40 Ark. 482; *State v. Brinkhaus*, 7 Crim. Law Mag. 343; R. S., sec. 1912. (3) The court should have instructed what facts and circumstances are necessary to be proven in corroboration of prosecutrix's testimony to establish a promise of marriage. R. S. 1879, sec. 1912; 1 Gr. Evidence [6 Ed.] p. 332, sec. 257; *State v. Heed*, 57 Mo.

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252; *State v. Hill*, 91 Mo. 432; *State v. Reeves*, 97 Mo. 673. (4) The woman, who in consideration of a promise of marriage is debauched, is not seduced. The testimony of prosecutrix as to what was said at time of illicit intercourse is not sufficient to prove seduction; it only proves that she was debauched. 49 Ga. 664; *State v. Carter*, 93 Mo. 242; *State v. Burgdorf*, 53 Mo. 65; *State v. Reeves*, 97 Mo. 668. (5) The words "corroboration" and "seduction," as used in indictment and instructions, must be defined. This was not done. *State v. Reeves*, 97 Mo. 673. (6) The first instruction is erroneous in that it only requires the prosecutrix to be seduced, and ignores the other elements of the crime, viz.: That she was debauched, unmarried, of chaste character or good repute, and less than twenty-one years of age. These elements are not covered by the words, "as charged in the indictment." *State v. Reeves, supra*. (7) The evidence concerning pregnancy, use of medicine and instruments is clearly inadmissible, on the grounds stated in the objection. 17 N. E. Rep. 736. (8) When the verdict is evidently the result of passion or prejudice, or unsupported by the evidence, the judgment will be reversed. *State v. Fuchs*, 17 Mo. 458; *Hipsley v. Railroad*, 88 Mo. 348; *Douglas v. Orr*, 58 Mo. 573; *State v. Castor*, 93 Mo. 242; *State v. Glahn*, 97 Mo. 679. (9) The demurrer to the evidence should have been sustained and defendant discharged. This error will be corrected in the appellate court. *State v. Staffen*, 16 Mo. App. 553; *State v. Bruner*, 17 Mo. App. 274. (10) Instructions 2, 3 and 5 for plaintiff are unwarranted, practically a comment upon defendant's testimony, and the effect of giving them is to cast suspicion on his evidence. *State v. Cook*, 84 Mo. 49; R. S. 1879, sec. 1920.

John M. Wood, Attorney General, for the State.

(1) The testimony in this case shows that the prosecutrix yielded to the defendant, after persistent

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coaxing and begging, on his part, and repeated promises to marry her. To the jury belonged the duty of weighing and passing upon the evidence. *State v. Musick*, 71 Mo. 401. (2) The reputation of the prosecutrix is presumed to be good, in the absence of any attack upon it. *State v. Hill*, 91 Mo. 423. (3) The first instruction was proper, as it required the jury to find all the facts charged in the indictment in order to convict the defendant. It was not necessary to enumerate those facts in the instruction. (4) The instructions as to the credibility of witnesses, and the weight to be attached to defendant's testimony, were correct. (5) The testimony admitted, on the part of the state, which was objected to by the defendant, tended to prove that defendant had had sexual intercourse with the prosecutrix, and was properly admitted. (6) The first instruction on the part of the defendant (number 7) as to the corroboration of the prosecutrix, as to the promise of marriage, was given as asked by defendant, and he has no cause to complain. (7) It is not alleged as one of the grounds for a new trial, that the court failed to properly instruct the jury as to the whole case, and it is too late to insist upon that as a ground for reversing the judgment in this court. (8) The instructions taken as a whole properly submitted the case to the jury, and the judgment should be affirmed.

THOMAS, J.—The defendant was indicted in the Polk county circuit court for seduction under promise of marriage, was tried therefor, and sentenced to imprisonment in the penitentiary for a term of two years.

I. The state stood on the uncorroborated evidence of the prosecuting witness in this case. She testified defendant promised to marry her, and under and by virtue of that promise seduced her. Section 1912, Revised Statutes, 1879, provides that "in trials for seduction under promise of marriage, the evidence of the woman, as to such promise, must be corroborated to

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the same extent required of the principal witness in perjury." It has been held by this court that "evidence of circumstances which usually accompany the marriage engagement will satisfy the statute as to supporting evidence." *State v. Hill*, 91 Mo. 423. Here the prosecuting witness testified to the promise and also to "the circumstances attending the marriage engagement," and the state argues that that satisfies the statute. It is *the evidence of the woman* as to the promise of marriage that must be corroborated. There must be some evidence independent of the principal witness as to the promise of marriage. In this case there is an attempt to evade this plain statutory provision by the principal witness testifying first to the promise of marriage and then to "the circumstances" that corroborate her. This is clearly not the law. She must be corroborated by some witness other than herself. *State v. Hill, supra*; Ros. Crim. Ev. [6 Am. Ed.] 765; *State v. Reeves*, 97 Mo. 668; *State v. Primm*, 98 Mo. 368.

II. There was no evidence whatever offered to show that the prosecutrix was a woman of good repute, and in such case there can be no conviction for the offense charged against the defendant in this case. The indictment must allege, and we think the better doctrine is the state must prove in the first instance, that the woman alleged to have been seduced is of "good repute." 1 Bish. Crim. Proc., secs. 1103-6; Bish. Stat. Cr. [2 Ed.] sec. 648; *State v. Hill, supra*. It is true the law presumes that every woman is chaste and of good repute, till the contrary appears; but so also does the law presume every one to be innocent of crime, till he be proven guilty. Hence we have one presumption nullifying the other, and in criminal trials the presumption of the innocence of the accused must prevail, till it be overcome by evidence beyond a reasonable doubt.

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Indeed, it seems no great hardship on the state to require it, when an attempt is made to send a man to the penitentiary for seducing a woman under promise of marriage, to allege and prove in the first instance, that the woman alleged to have been seduced is of "good repute." This conclusion seems better to accord with the legal analogies and reason than the contrary doctrine. Evidence of the previous chastity of the seduced woman, which is required in some states, must in the nature of things be only slight, but there can be no difficulty in proving "good repute," as required by our statute, if the woman be of "good repute."

III. The instructions refer the jury to the indictment to determine what they must find in order to convict. This is error. It is the duty of the court, in plain and concise language, to define the offense accurately and tell the jury the essential facts necessary to be found to authorize a conviction. That was not done in this case.

The judgment is reversed and cause remanded. All of this division concur.

SHAW *et al.*, *Appellants*, v. THE MISSOURI PACIFIC
RAILWAY COMPANY.

DIVISION ONE.

1. **Railroad: NEGLIGENCE: PETITION.** A petition in an action against a railroad for the death of a person by its negligence is sufficient which avers in substance that the defendant by its servants while running a locomotive and train of cars over its road, did so carelessly and negligently manage and conduct the same that it ran against, struck and fatally injured the deceased.

104	648
49a	533
53a	401
104	648
132	586
57a	332
104	648
72a	17
104	648
147	424
104	648
e83a	133
104	648
163	489
104	648
164	286

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2. ——— : ——— : TRESPASSER ON TRACK. The servants of a rail road company owe to a trespasser on its trestle only the duty, so soon as he is discovered on the track, of promptly using all efforts within their power, consistent with the safety of the train and of those upon it, to avoid injuring him.
3. The Evidence in this case examined and the action of the trial court in sustaining a demurrer to plaintiff's evidence sustained.

Appeal from Jasper Circuit Court.—HON. M. G. MCGREGOR, Judge.

AFFIRMED.

Thomas & Hackney and J. D. Perkins for appellants.

(1) The trial court erred in sustaining defendant's demurrer to plaintiffs' evidence. When the persons in charge of a railroad train see persons on the track in front of the train in an exposed and dangerous condition, it is their duty to immediately use all efforts within their power, consistent with the safety of the persons and property on the train, to stop or check the speed of the train. *Donahoe v. Railroad*, 83 Mo. 543.

(2) "A demurrer to the evidence admits the truth of the facts in evidence and all reasonable inferences in plaintiffs' favor which can be drawn therefrom." *Kelly v. Ry. & Transit Co.*, 95 Mo. 279. "When the facts are either disputed, or different inferences may be fairly drawn from the undisputed facts, the question should be submitted to the jury." *Mauerman v. Siemerts*, 71 Mo. 101; *Huhn v. Railroad*, 92 Mo. 440; *Norton v. Ittner*, 56 Mo. 351. "A demurrer to the evidence admits the facts which the evidence establishes, or tends to establish, as well as all inferences which may be fairly drawn from them." *Reiley v. Railroad*, 94 Mo. 600. "When from the evidence the question of negligence is one about which reasonable minds may differ, it should be left to the jury to make the deduction from all the circumstances to determine the ultimate fact."

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Tabler v. Railroad, 93 Mo. 79. "If there is any evidence to support an issue it must go to the jury, who are the exclusive judges of its weight and sufficiency, however slight it may be, and whether it be direct or inferential." *Charles v. Patch*, 87 Mo. 450.

R. T. Railey for respondent.

(1) The court properly sustained defendant's demurrer to the evidence. The petition did not state facts sufficient to constitute a cause of action. The practice act requires plaintiff to state in his petition a plain and concise statement of the facts constituting his cause of action. The petition in the case at bar, stripped of unnecessary verbiage, simply says in effect, that defendant's servants in Jasper county, Missouri, on May 1, 1887, struck and killed plaintiffs' son, who was a minor and unmarried at the time, while negligently running a locomotive and train of cars. This is simply a conclusion, and does not tender an issue of any facts constituting the alleged negligence. The petition, therefore, is fatally defective. R. S. 1889, sec. 2038; R. S. 1879, sec. 3510; *Gurley v. Railroad*, 93 Mo. 450; *Harrison v. Railroad*, 74 Mo. 369; *Waldhier v. Railroad*, 71 Mo. 516. (2) The second paragraph of petition contains simply a bald conclusion, without stating where or how the injury occurred, what deceased was doing, what duty defendant owed him, or any other facts which tender an issue in the case. Under the foregoing authorities, the above allegation fails entirely to state a cause of action. The fourth paragraph of petition is equally ~~as~~ defective, and would seem to predicate plaintiffs' right of recovery, upon the failure of defendant to hire competent and skilful servants. It is also fatally defective, if this charge is attempted to be made, because it fails to show that defendant had any notice of such incompetency, or that it was guilty of negligence in employing or

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retaining incompetent servants. It also fails to plead the facts, constituting any negligence upon the part of defendant. Again, there was not a syllable of testimony in the case tending to show that defendant's servants were incompetent. On this proposition, the petition was not only fatally defective, but there was an entire failure of proof. (3) The deceased was a trespasser upon defendant's track. He was occupying an extremely perilous and dangerous position, and he and those with him were guilty of gross and inexcusable negligence in attempting to cross a lengthy and dangerous trestle and bridge, without any means of escape, where trains were constantly passing and repassing. The uncontradicted testimony of plaintiffs discloses that defendant's engineer in charge of the train which killed deceased, after becoming aware of his presence upon the track, immediately reversed his engine, and did everything within his power to stop the train and avert the injury complained of. Even, therefore, if the petition stated a good cause of action, yet the plaintiffs are not entitled to recover under the testimony, and the trial court properly sustained defendant's demurrer to the evidence. *Barker v. Railroad*, 98 Mo. 53; *Yancy v. Railroad*, 93 Mo. 437; *Williams v. Railroad*, 96 Mo. 283; *Henze v. Railroad*, 71 Mo. 636; *Halliham v. Railroad*, 71 Mo. 116; *Moody v. Railroad*, 68 Mo. 473; *Fletcher v. Railroad*, 64 Mo. 490; *Harlan v. Railroad*, 64 Mo. 482. (4) The trial court has an opportunity to see the witnesses and hear them testify; it has a better opportunity than the appellate court to notice the conduct of the witnesses upon the stand; their manner of testifying; the vindictiveness and prejudice which characterize their testimony, and many other things which never reach this court. Can this court, therefore, in view of the uncontradicted testimony, say that the trial court committed error in sustaining the demurrer? It would have felt constrained to set aside a verdict in favor of plaintiffs, under the

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evidence; and we, therefore, insist that it properly took the case from the jury. *Jackson v. Hardin*, 83 Mo. 186; *Powell v. Railroad*, 76 Mo. 84; *Landis v. Hamilton*, 77 Mo. 561; *Hansmann v. Hope*, 20 Mo. App. 197.

BRACE, J.—This is an action for damages brought under section 2121, Revised Statutes, 1879, by plaintiffs, who are husband and wife, for the alleged negligent killing of their minor son.

The material allegations of the first paragraph of the petition on which alone any evidence was offered are as follows: "That on said first day of May, 1887, the defendant, by its agents, servants and employes, while running and operating a locomotive and train of cars over its said road, in said county, did so carelessly, negligently, recklessly, heedlessly and unskilfully run, manage and conduct its said locomotive and train of cars over its said road at a point in said county, that said locomotive and train of cars ran against, struck and fatally injured and wounded Frank Shaw, of which said injury and wounding the said Frank Shaw, on said first day of May, 1887, in said county, died."

The answer was a general denial with plea of contributory negligence. After the evidence for the plaintiffs had been heard, the court sustained a demurrer thereto. Thereupon the plaintiff took a *nonsuit* with leave, and judgment was rendered for the defendant. The court refusing to set aside the nonsuit, plaintiffs appealed.

The facts developed by plaintiffs' evidence are substantially as follows: On the first day of May, 1887, the plaintiffs' son, Frank Shaw, aged six years and nine months, was struck and killed by one of defendant's locomotives, running south over a trestle on its road at a point about ten feet from the south end of said trestle. The locomotive was drawing a train of twenty-six cars, nearly all heavily loaded, down a

grade of fifty-two feet to the mile, and running at the rate of about twenty or twenty-five miles an hour. The trestle upon which the lad was struck was the south approach to an open truss bridge across Spring river, or a branch of it, near Carthage, Missouri. This bridge is approached from the north also by a similar trestle; the length of the north trestle is two hundred and fifty-six feet, of the bridge one hundred and twenty-four feet, and of the south trestle two hundred and fifty-four feet, making the whole length of the trestling and bridge six hundred and thirty-four feet. The cross ties on this trestling and bridge are from sixteen to eighteen inches apart, with no plank laid across them, and the only way for a footman to cross is by stepping from one to another, on the cross ties between the rails (they extending only from sixteen to eighteen inches outside the rails). The trestle is fifteen feet high at the south end of the bridge, and nineteen feet high at the north end; nine hundred and sixteen feet north of the beginning of the trestle north of the bridge beside the road-bed there is a lime kiln. North of the lime kiln about five hundred feet is the end of a curve around a bluff, where the engineer first comes in sight of the track along the trestling and bridge.

On the morning of the accident, William H. Corbett (who had lived near the road for two months, and who knew when this train was due) with his wife, the deceased and a brother of the deceased, aged about nine years, named John, entered upon the track south of the lime kiln, and proceeded south on the track, over an embankment, to the north trestle, Corbett, his wife, and Frank in the lead, John following on behind; they passed over the north trestle; Corbett, his wife and Frank passed over the bridge and got about half way across the south trestle. John was on the bridge about half across approaching the south end, when Corbett heard the train coming, told his wife to hurry across; she and Frank stepped on as fast as they could, and he

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turned, saw the train coming around the curve, and John on the bridge, ran back, met John at end of the bridge, took him up and with him stepped off the track onto one of the stone abutments of the bridge; the train passed by them, overtook his wife and Frank, the locomotive striking them before they reached the end of the trestle, inflicting injuries from which they died; passed on, commenced going perceptibly slower after it struck the up grade and stopped when it reached about the top of that grade. The train was a regular daily freight, five minutes' late. The engineer whistled for curve, and after turning it, and when about opposite the lime kiln, he discovered these parties on the track. From the point opposite the lime kiln, where the engineer first discovered the parties on the track to the point where the child was struck was about fifteen hundred and forty feet.

The foregoing are the undisputed facts in the case as they appear upon the record. In connection with these facts and the evidence of the following witnesses, plaintiffs contend that the case ought to have gone to the jury.

The engineer testified for plaintiffs, and says, that as soon as he saw them he reversed his engine, called for brakes and opened his sand chest, but the engine did not receive much check from that, on account of a strong southeast wind that blew the sand off the rails; that he did all in his power to stop the train, from the time he saw them; that he was an experienced engineer and would be doing well if he stopped the train under the conditions, at the speed and on the grade it was going, within a half mile.

The plaintiff, Mrs. Shaw, and witness, R. J. Nokes, who saw the accident from a point in a lane distant across a field, about an eighth of a mile, testified,—Mrs. Shaw that the engineer did not make any effort to stop; that she saw the engine and it was never reversed; that she did not see the engineer, but didn't think he ever

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tried to stop the engine. When asked if she didn't see the engineer, how she knew he didn't reverse his engine, she answered: "Because I know, and he just poured on more steam; when he saw he was going to kill the child anyhow, he just poured on more steam." When asked do you know when an engine is reversed, she answered, "I know when more steam is poured on, and the engine is going right ahead."

"Q. Could you tell whether that engine was reversed? A. I can tell when an engine is coming ahead as fast as it can."

She further testified she heard no whistling until the engine was quite close to the child.

The witness Nokes testified that he couldn't notice that the train checked a particle until the train struck the child and Mrs. Corbett; that he was noticing particularly, and if it had checked he would have noticed it; they checked pretty quick after they had passed them; that the train didn't whistle until about the time it passed Mr. Corbett.

L. R. Sperry, who witnessed the accident from a position beside the track in line with the approaching train, about eleven hundred feet distant, in his evidence, stated that he heard the whistle before the train turned the curve; that afterwards the train did not whistle or check until the child was struck; he didn't see the wheels reversed, if by reversed it means to turn backwards; didn't see any of the men until after the child was struck; at the distance he was, does not think he could tell whether the engine was reversed; could only tell by the material checking of the train.

Thomas C. Wilkinson, who was upon a very large bluff, out of sight of the train, heard a sharp, shrill whistle as if something was the matter, ran about one hundred feet down near the bridge where he could see the train, which was then on the north trestle of the bridge; that he supposed at the gait he took he would run this one hundred feet in half a minute.

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I. It is unnecessary to notice at length or in detail the objections urged against the petition, to which no exception was taken below. Under the rulings of this court, the petition stated a cause of action. *Schneider v. Railroad*, 75 Mo. 295; *Mack v. Railroad*, 77 Mo. 232; *Donaldson v. Butler Co.*, 98 Mo. 163; *Kellny v. Railroad*, 101 Mo. 67; *Pope v. Railroad*, 99 Mo. 400, and cases cited.

II. It is not often that cases come before the courts, in which such recklessness is exhibited as appears in this case in the conduct of Corbett, in attempting with his wife and these two little boys to cross this long, high and dangerous trestling and bridge on the time of this train of which he was cognizant. The only excuse he offers is that he did not know it was so late. They were trespassers, traveling where they ought not to have been, and where defendant's servants, managing its train, had a right to expect, if anywhere, that no person would be. They owed but one duty to the deceased, and that was, as soon as he was discovered on the track, to promptly use all effort within their power, consistent with the safety of the train, and those who were upon it, to avoid injuring him. The affirmative evidence of the plaintiff shows plainly that this duty was discharged. The only servant of the defendant who discovered the child on the track was the engineer; he made this discovery when his locomotive was distant from the child about fifteen hundred and forty feet, on a down grade, with a heavy train which could not be stopped on that grade within less than twenty-six hundred and forty feet. He promptly reversed his engine, opened his sand bag and whistled for brakes; if there was anything else he could have done to avoid the injury, it does not appear in the evidence.

The facts testified to by the witnesses, other than the engineer, do not impair the force of this affirmative evidence, the substance of which is that three of the witnesses, at a distance of from eleven hundred to

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thirteen hundred and twenty feet, did not perceive any checking of the speed of the train until after the train had struck the child, reached the short stretch of level track and was about commencing the ascent of the up grade, and that one of them did not hear any whistling at all; one not until the engine was close to the child; one about the time it was passing Corbett at the south end of the bridge, about two hundred and forty feet from the child, while a fourth witness heard the whistling about a half a minute before the train reached the bridge, and when it must have been near the lime kiln.

There was no evidence tending to prove that, if the engineer did the things he testified to, the effect of them would have been to so check the speed of the train within the distance, as that its diminished speed would have become perceptible to these witnesses under the circumstances before the child was struck. The fact that one of the witnesses did not hear any whistling at all is of no force, in view of the fact that the three others did, and when their evidence is taken together, showing the three points at which they heard the whistling, tends to confirm the evidence of the engineer.

The legal principles governing in the case have been so often announced and are so well settled, that a review of the authorities is unnecessary.

We find nothing in the facts of the case, as they appear in the record, to warrant us in reversing the judgment of the circuit court, the judge of which had so much better opportunity of appreciating the force of the evidence than we have. The judgment is affirmed. All concur.

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 SPURLOCK, *Plaintiff in Error*, v. THE MISSOURI PACIFIC
RAILWAY COMPANY.

 DIVISION ONE.

Practice : AMENDED PETITION : DEPARTURE : WAIVER. Where a defendant files an answer to an amended petition changing the cause of action from the original one, and goes to trial on the merits, he cannot, after a new trial has been awarded, object to another amended petition on the ground of its being a departure from the original one.

Appeal from Hickory Circuit Court.—HON. W. I. WALLACE, Judge.

REVERSED AND REMANDED.

James P. Ross for plaintiff in error.

(1) The circuit court erred in dismissing the plaintiff's suit. This court expressly held that the objection, that this cause of action had been changed, came too late after trial. Objections must be made at the time. 93 Mo. 530. The amendments in the fourth petition were suggested by this court, and the case reversed on first count and remanded for a new trial. (2) The circuit judge reversed the rulings of this court, or at least refused to obey its mandates. That is cause for reversal by this court. This court will remember that no demurrer or motion to strike out was ever maintained by the lower courts. The defendant pleaded a general denial, and went to trial on the third amended petition, and that estops it. (3) It is not a good objection to an amended petition that the former petition did not state a cause of action. *Robertson v. Railroad*, 21 Mo. App. 633; *Elfrank v. Seiler*, 54 Mo. 134. When the pleadings are amended the functions of the former

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pleadings are at an end. *Corley v. McKeag*, 9 Mo. App. 38. (4) Amendments which do not prejudice the adverse party are always admissible. *Utley v. Tolfree*, 77 Mo. 307; *Carr v. Moss*, 87 Mo. 447. In this suit the cause of action was always the same. The same evidence is required in all the petitions, also of the defense. the amendment of a petition before trial which changes the cause of action from one *ex contractu*, to one *ex delicto*, is not objectionable if it relates to same subject-matter or transaction." *Robertson v. Railroad*, 21 Mo. App. 633. The points in this case were all decided in favor of the plaintiff when the case was before it in 1886. 93 Mo. 530.

W. S. Shirk for defendant in error.

(1) The causes of action alleged in the original petition, were: In the first count to recover for an excess of freight charged on seven carloads of ties, and was framed under Revised Statutes, 1879, sections 834 and 835. In the second count to recover a penalty of \$1,000 and attorneys' fees, for charging plaintiff a greater toll for shipping his ties to Kansas City, than it charged for shipping like freight over equal or greater distances of other portions of its road, and was framed under Revised Statutes, 1879, sections 820 and 822. Both these counts were for purely statutory causes of action. (2) The cause of action stated in the fourth amended petition is purely an action on the case for damages accruing to plaintiff by reason of the wrongful failure and refusal of the defendant to perform its common-law duties as a common carrier. Hence it was an entire abandonment of either cause of action stated in the original petition, and the substitution of a new and entirely different cause of action. Such amendments are not allowed, if timely objection is made, and the court did not err in striking out said fourth amended petition, on motion before trial, and filed immediately after the petition itself was filed. *Fields v. Maloney*, 78 Mo. 172,

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particularly on 174, and authorities ; *Parker v. Rhodes*, 79 Mo. 88 ; *Scovill v. Glasner*, 79 Mo. 450 ; *Sims v. Field*, 24 Mo. App. 557. (3) And the fact that defendant chose to go to trial upon the third amended petition, when it might have had it stricken out by timely motion, certainly cannot be held to be a waiver of its right to object to any petition which might be subsequently filed. If so, then plaintiff might by such petition change its cause of action to slander or replevin, and defendant would be compelled to go to trial upon it. Bliss on Code Pleading, sec. 429, and authorities cited.

SHERWOOD, P. J.—This cause has been before this court heretofore, and is reported in 93 Mo. 530. The cause of action as originally stated, it seems, was changed in the third amended petition, the sufficiency of which was passed upon by this court. On the return of this cause to the lower court, plaintiff filed a fourth amended petition, which on motion of the defendant was stricken out, on the ground that it contained an entirely different cause of action from that stated in the *original* petition.

This ruling of the trial court was obviously incorrect, because the defendant had pleaded the general issue to the third, amended petition, which contained allegations similar to those contained in the fourth amended petition. Having gone to trial on the amended petition it was quite too late for the defendant to raise the question that the fourth amended petition had changed the cause of action from what it was in the *original* petition. The case of *Fields v. Maloney*, 78 Mo. 172, has been cited by defendant's counsel to sustain the action of the trial court. That case decides that, if a change of venue be taken in a partition cause to the circuit court of another county, and then the cause of action without objection be changed to one in ejectment, and a trial be had on such changed cause of action, the circuit court to which the change of venue

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is taken will acquire no jurisdiction, though no exception be taken in the trial court.

But that case is not law, and is contrary to everything written in the books, announcing, as it does, that though the court has jurisdiction of the "*subject-matter of the action*," and though the parties *submit themselves to that jurisdiction*, yet that the whole proceedings are *coram non judice*. Besides, the dissenting opinion therein was expressly approved by this court in *Stearns v. Railroad*, 94 Mo., *loc. cit.* 322, and we again overrule that decision.

Judgment reversed and cause remanded. All concur.

THE STATE *ex rel.* CLARK V. SMITH, *Clerk of the County Court.*

IN BANC.

1. **Mandamus: OFFICER.** The remedy by *mandamus* is allowable against a public officer only in case the person seeking its benefit is directly interested in the performance of the matter demanded, and has no other adequate, specific and effective remedy at law.
2. ———: ———. Where a pending election contest affords one a sufficiently plain and specific remedy to have his right to an office determined, he cannot resort to *mandamus*.
3. **Contested Election Case: NOTICE.** The notice of contest initiates the proceeding in a contested election case.
4. **Mandamus: PRACTICE.** A motion, for a peremptory writ of *mandamus* notwithstanding the return of respondent, operates as a demurrer to such return.

Mandamus.

PEREMPTORY WRIT DENIED.

104	661
123	540
104	661
126	417
104	661
134	354
104	661
83a	665

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W. Cloud and Adiel Sherwood for relator.

(1) The duties of the county clerk are ministerial and not judicial. He has no duty, except to certify the number of votes cast for each candidate for each office, as the result of a sum in simple addition, with no power to pass upon the legality of returns, or to judge of their sufficiency. *McCrary, Election Laws*, sec. 84; *State v. Cavers*, 22 Iowa, 343; *Attorney General v. Barstow*, 4 Wis. 749; *Bull v. Southwick*, 2 N. M. 321; *Mayo v. Freeland*, 10 Mo. 629; *State ex rel. v. Harrison*, 38 Mo. 540; *O'Ferrell v. Colby*, 2 Minn. 184; *Brown v. O'Bryan*, 2 Carter (Ind.) 423; *State ex rel. v. Steers*, 44 Mo. 220; *State ex rel. v. Vail*, 53 Mo. 112; *State ex rel. v. Judge*, 7 Iowa, 199. (2) The plea that a commission has been issued to Sturgis is matter in abatement and not matter in bar. So also is the attempted plea in paragraph number ten of the return, alleging that a notice of contest has been served. All these matters in abatement are waived by the several pleas to the merits. *People v. Silver*, 45 Ill. 224. (3) *Mandamus* is the proper remedy, though it did not determine the ultimate right involved as where *quo warranto*, or other proceedings, must afterwards be instituted to secure the fruits of the victory in *mandamus*. *State ex rel. v. Judge*, 7 Iowa, 200; *Ex parte Strong*, 20 Pick. 495; *People ex rel. v. Akin*, 17 Ill. 169; *Brown v. O'Bryan*, 2 Ind. 430. (4) It is a feeble answer to relator's demand for peremptory writ to say, that he has a remedy in *quo warranto* or by contest. Before relator can be deprived of his writ upon such a plea, it must be definitely ascertained that the other remedies proposed are adequate, specific and appropriate, and afford relief upon the very subject-matter of the controversy, and give the particular right which the law accords upon the statement of facts in the petition for *mandamus*. *Etheridge v. Hall*, 7 Porter (Ala.) 54; *In re Trustees of Williamsburgh*, 1 Barb. 34; *Fremont v. Crippen*,

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10 Cal. 211; *Babcock v. Goodrich*, 47 Cal. 488; *State v. Wright*, 10 Nev. 167. More than this, the remedy must be one which can be enforced against respondent, and not against third persons. *Williams v. Clayton*, 21 Pac. 398. (5) The fact that the certificate of election has been given to Sturgis does not affect the result. Such an act is on a par with the judgment of a court without jurisdiction. The question is, was the act lawfully done? *State v. Court of Appeals*, 97 Mo. 331; *Attorney General v. Barstow*, 4 Wis. 725; *People ex rel. v. Rives*, 27 Ill. 242. (6) The certificate to exhibit "C" is the best evidence of the number of votes cast. It was the last and most solemn act of the judges. It was done deliberately and advisedly and at the conclusion of their labors.

George Hubbert and *M. E. Benton* for respondent.

(1) There is no reason for invoking the exercise of *mandamus* by this court. Relator's remedy in the circuit court by a contest proceeding is ample. *State v. Buskirk*, 43 Mo. 111; *McElhaney v. Stewart*, 32 Mo. 379; *State v. Green*, 1 Mo. App. 226; *Hunter v. Chandler*, 45 Mo. 352; *People v. Supervisors*, 12 Barb. 217; McCrary on Elections, sec. 322; *State ex rel. Broadhead v. Trigg*, 76 Mo. 186; *Bowen v. Hixon*, 45 Mo. 340. (2) "It is well settled that, in issuing a commission, the governor acts in a political or executive capacity, and he alone can judge whether the power should be exercised or not, and the courts can neither control nor interfere with him in the exercise of this right." Opinion of supreme court to Gov., 58 Mo. 369, 372; *State ex rel. v. Governor*, 39 Mo. 388; *Hawkins v. Governor*, 33 Am. Dec. 346. (3) *Mandamus* will not lie in a case involving the title to an office, when that office is already filled by a person holding by color of right. And in this case, though Sturgis had not, at its commencement, entered on the discharge of the duties of the office, yet, having

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been commissioned and qualified, nothing remained to be done except to await the mere lapse of time; and before a decision is reached in this court he will be the officer *de facto* as well as *de jure*. *St. Louis County Court v. Sparks*, 10 Mo. 117; *State ex rel. v. Rodman*, 43 Mo. 256; *People v. Olds*, 58 Am. Dec. 398. (4) Respondent submits that, by considering the whole of the so-called poll books, inclusive of the Thurman book properly understood, the election of Sturgis by three majority is clear. The ambiguity, patent upon the Thurman book, had necessarily to be cleared by inspection and the exercise of common sense, before the true vote there certified for Sturgis could be determined, or counted, or certified. That the canvassing officers are not cut off from the use of their eyes in such matters, is apparent from what has been held by this court. *State, etc., v. Metcalf*, 65 Mo. 480; *State, etc., v. Steers*, 44 Mo. 223. The Dayton book with its apparent majority of forty-eight for Clark should be excluded from the count, and this requires a denial of a peremptory writ, whatever may be said of other questions. *State, etc., v. Steers*, 44 Mo. 223. And it was only from such certificate, and not anything back of it in the poll books or tally sheets, that the canvassers could lawfully ascertain the number of votes given for any person for office. *State ex rel. v. Berg*, 76 Mo. 136; *State ex rel. v. Garesche*, 65 Mo. 480; *State ex rel. v. Trigg*, 72 Mo. 365. And returns, void on their face, should be rejected, even by the ministerial canvassers of election returns. *State v. State Canvassers*, 36 Wis. 498; *Lawrence Co. v. Schmaulhausen*, 123 Ill. 321. Where the general rule, confining the functions of election canvassers to purely ministerial acts, was held in its strongest phase it is conceded that they might "probably judge whether the returns are in due form." *People v. Head*, 25 Ill. 328. (6) But there being a doubt of relator's election the peremptory writ should be denied. *People v. Davis*, 93 Ill. 133; *People v.*

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Johnson, 100 Ill. 537; *Martin v. Martin*, 27 Mo. 225. (7) The alternative writ is not sufficient to support a judgment or peremptory writ, in that it does not show previous "demand" by the relator upon the respondent for the performance of the alleged duty. *Orville v. Supervisors*, 37 Cal. 354; *Condit v. Austin*, 25 Ind. 422; *State v. Davis*, 17 Minn. 429; *State v. Lebra*, 7 Rich. 234; *Cort v. Elliott*, 28 Neb. 293. And this objection to the sufficiency of the writ may be taken any time, at or after the making of the return to it. *Board of Trustees v. People*, 12 Ill. 248.

MACFARLANE, J.—The return of respondent to the alternative writ, after special denials of the statements thereof in regard to the result of the election for which relator was a candidate, his refusal to certify the result of the election, and that he falsified the same; and, after giving a detailed statement of the manner in which he had performed his duties as clerk, in canvassing the vote, made the following special plea in bar to the writ:

"On the twenty-fifth day of November, 1890, the relator, R. F. Clark, gave and delivered to the said John F. Sturgis notice of contest of his said election to said office, specifying the grounds upon which the said Clark, as contestant, intends to rely, raising objections to the vote in Sturgis' favor in all the voting precincts, and making objection to the qualification of divers voters at said election, and giving the names of such voters and stating the objections therein. Which said notice was served fifteen days before the May term, 1891, of the circuit court of said Newton county at which said election will be contested. The contest so begun by the relator herein is still pending, the writ in this cause, to-wit, the alternative writ of *mandamus*, was issued by this court upon relator's petition therefor on the twenty-sixth day of November, 1890, and was

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served on defendant on the twenty-eighth day of November, 1890.”

The return further showed that on the sixth day of November, 1890, respondent completed the canvass of the vote of said county, and before the issuance of the writ herein had certified the result thereof to the secretary of state, and on the fourteenth day of November, 1890, the said Sturgis had been duly commissioned by the governor as prosecuting attorney of said county.

The remedy by *mandamus* will only be allowed against a public officer in case the one claiming its benefits shows himself to be directly interested in the performance of the thing demanded, and that he has no other adequate, specific and effective remedy at law by which he may obtain the result sought. The ultimate result sought to be accomplished by relator, under this proceeding, was to determine, as between himself and Sturgis, which was, on the face of the returns of the judges and clerks of the various voting precincts, elected to the office of prosecuting attorney of the county. The writ shows, and the return admits, that relator has such a direct interest in the proper canvass of the vote by the county clerk, as authorizes him to invoke this remedy and a peremptory writ should issue unless the facts pleaded in the return constitute a bar thereto.

The motion of relator for a peremptory writ, notwithstanding the return of respondent, operates in the nature of a demurrer to the return, and admits the truth of every affirmative allegation thereof which is sufficiently pleaded.

The statute (sec. 4706) provides that contests of elections shall be commenced by giving to the contestee a notice thereof within twenty days after the votes have been officially counted. It provides for the service of this notice in a certain specified manner and requires it to specify the grounds upon which the contestant intends to rely, the names of the voters whose votes will

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be objected to, and the ground of such objection. The return pleads all the facts the statute requires so as to show that a notice sufficient in recitals was served upon the contestee within the time and in the manner required by the statute. This notice is the initiatory step in the contest and operates in the nature of a petition and writ in an ordinary civil action, and is all that is required by the statute to initiate the contest.

After notice has been served, parties are allowed process and may take depositions. The contest shall be heard and determined in a summary way at the first term of court without formal pleadings. The facts showing the pendency of the contest were, we think, sufficiently pleaded, and it, therefore, stands admitted under the pleadings that a contest was pending when this proceeding was commenced.

The return of respondent shows that he had already undertaken to discharge his duties, and he sets out fully and in detail the manner in which it was done. It appears from this return, and from attached copies of the poll books, that the result of the election as between relator and Sturgis depends upon the count of the vote of Thurman precinct. The poll books as returned by the judges of election to respondent as county clerk show in one part of the certificate that Sturgis had received forty-nine votes, while in the latter part of the certificate Sturgis is given thirty-nine votes. The returns from two other precincts were rejected by the clerk for the reason that the judges and clerks were not sworn, and no certificates to the returns were made by them. Relator insists that the vote, appearing on these poll books, should have been counted. It appears that it will take the vote of the two rejected precincts, and also a count of the thirty-nine votes to Sturgis in Thurman precinct to elect relator. The clerk counted forty-nine votes for Sturgis in this precinct, and this count, which would include the two rejected precincts, gives Sturgis three votes majority.

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The relief sought by relator in this proceeding is to require respondent, as clerk, to count the two rejected precincts, and to count for Sturgis the thirty-nine instead of the forty-nine votes certified from Thurman precinct.

The question then is whether the contest now pending between relator and Sturgis affords to relator a plain and specific remedy which is fully adequate to redress the grievances complained of. If it does so the peremptory writ should be denied. High, Ex. Rem., sec. 16; *People v. Cover*, 50 Ill. 101; *State v. Supervisors*, 29 Wis. 79; *State ex rel. Patterson v. Marshall*, 82 Mo. 486; *Williams v. Court*, 27 Mo. 226; *Byrne v. Harbison*, 1 Mo. 225; *State ex rel. Wheeler v. McAuliffe*, 48 Mo. 114; *Ingerson v. Berry*, 14 Ohio St. 321.

In this contest the true vote of any precinct, or of the whole county, may be ascertained by opening the ballot boxes, and making a recount of the vote. The certificates of the judges of election and of respondent may be disregarded entirely. The vote of the rejected precincts, and the true vote of Thurman township can in that way be ascertained and counted accordingly. Const. of Mo., sec. 3, art. 8; R. S. 1889, sec. 4706; *Shields v. McGregor*, 91 Mo. 534; *Gumm v. Hubbard*, 97 Mo. 311. Thus it will be seen that relator has a specific remedy by which he can secure a count in his favor of all votes of which he may have been deprived, by any failure of duty on the part of either the judges of election, or respondent, and the vote of Sturgis can be corrected if improperly certified.

If, in this contest, relator is found to have been elected, he will not be left with a barren adjudication that he has suffered a wrong, as in a successful proceeding by *mandamus*, but he may be given full and adequate relief for such wrong by being, at once, and summarily, placed in possession of the office of which he had been illegally deprived. R. S. 1889, sec. 4707. So it will be seen that relator's remedy by contest is

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adequate to redress the grievances of which he complains.

The remedy by contest accomplishes through one plain, practical, summary proceeding all that is necessary to do full and complete justice between the parties, much of which could not be accomplished by *mandamus* alone. There is no violated right of relator, of which complaint is made in this proceeding, that cannot be fully, adequately and summarily remedied by the pending contest, and the peremptory writ ought to be denied.

In view of the conclusion reached, we do not deem it necessary to consider or determine the duties of respondent in canvassing this vote, or whether he properly discharged that duty. Neither do we decide whether, after respondent had fully exercised his official power in the premises, by canvassing the vote, and certifying the result to the secretary of state, *mandamus* would lie to require a recount, if the first was found to have been improperly or erroneously made.

Peremptory writ denied. All concur except SHERWOOD, C. J., who dissents. BLACK, J., is also of the opinion that the writ should be denied for the further reason, that the return and the exhibits filed therewith show that a proper canvass of the vote of the county would not change the result of the election as certified by respondent.

SEPARATE OPINION.

BARCLAY, J.—By concurring in the views of my learned associate, who has just announced the conclusion of the full court, it is not my intention to recede, in any particular, from the positions taken in the opinion of the divisional court number 1, upon the subjects not dealt with by the opinion of the court *in banc*.

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BILLS AND NOTES.

1. ATTACHMENT : ACCEPTOR OF BILL OF EXCHANGE BEFORE MATURITY. The acceptor of a bill of exchange for accommodation of the drawer cannot, under Revised Statutes, 1889, section 522, maintain an attachment against the latter before maturity of the paper and before any payment on account thereof. *Ellis v. Harrison*, 270.
2. CORPORATIONS : NEGOTIABLE NOTE : EXTRINSIC EVIDENCE. Where negotiable notes are signed by the president of a corporation in his own name and nothing appears on the instrument to indicate he was acting as agent of the corporation, extrinsic evidence is inadmissible to show such agency. *Sparks v. The Dispatch Trans. Co.*, 581.

CERTIORARI.

1. CERTIORARI : OFFICE OF WRIT. The office of the writ of *certiorari* is to bring the record of the proceedings of an inferior court or tribunal before a superior court to determine whether it had acted legally and within its jurisdiction. *The State ex rel. The Mo. Pac. Ry. Co. v. Edwards*, 125.
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2. — : — : PECULIAR BENEFITS. Any benefits the construction and operation of the railroad would add to the property not taken, by way of increased facilities for marketing coal, should be deducted from the damages, but such benefit should be peculiar to the property on account of the uses made of it. *Ib.*
3. — : — : DAMAGES TO COAL MINE. The damages assessed should not be confined to the surface of the land and the machinery in use in the business, but should also apply to the internal arrangements of the mine and the appliances therein provided for its economical and successful operation and to all the external arrangements which add to its value. *Ib.*

4. ——— : ——— : ——— : RAILWAY CONNECTION. The facilities for the transportation of coal and railway connection with the mine is a valuable property right which belongs to the owner of the land, and, if injured by the appropriation of the land, such injury will constitute a damage to the remaining property for which compensation should be made, although the railroad switches and tracks making the connection with the mine belonged to the railroad company. *Ib.*
5. CONDEMNATION FOR RAILROAD : COAL MINE : AVERTING DAMAGE. The damages should be estimated as of the date of the assessment by the commissioners, and on the assumption that defendant had adjusted or would adjust his property to its changed condition so soon as it could be reasonably done, and in such manner as to avert all damages that could be avoided by reasonable care and expense. *Ib.*
6. ——— : ——— : ———. If the business of defendant as a miner of coal was necessarily interrupted by reason of the appropriation of a part of his land, compensation should be allowed for the reasonable value of the use of the mine during the period of such necessary interruption. *Ib.*
7. ——— : ——— : ———. Where a railroad company condemns a right of way across the owner's lot in such a way as to separate his engine from his mining shaft and machinery at the pit top, it is proper for the jury in estimating the depreciation of the value of the property to take into consideration the number and speed of passing trains, the danger of accidents to defendant's employes and the risk of fires. *Ib.*
8. ——— : ——— : ———. The connection of the mine with a railroad other than plaintiff's is a valuable property right, and if necessary changes and readjustment of engine, shaft and other appliances rendered it necessary to change the railroad connection the reasonable expense of the same should be allowed in estimating damages. *Ib.*
9. ——— : ——— : ———. Where it becomes necessary to wholly abandon the shaft because of the condemnation, its value should be allowed in estimating damages and not the expense of making a new one. *Ib.*
10. ——— : ——— : ———. It is not error to instruct the jury, if the appropriation of the right of way has entirely cut off defendant's connection with the other road and so prevented the operation of the mine, defendant is entitled to damages from the loss of business from the filing of the commissioners' report to the completion of plaintiff's road. *Ib.*
11. ——— : ——— : ———. The defendant is entitled to compensation in money and cannot be required to accept in lieu thereof licenses and privileges to go upon and use the right of way or a release of part of it. *Ib.*
12. ——— : ——— : ———. Where the switch, chute, pit top and other connections of the mine are not actually taken, though they may have been rendered valueless for the purpose for which they were designed, it does not follow that they have become valueless for all purposes and it is erroneous to instruct the jury to allow damages to the extent of their full value instead of their depreciation in value. *Ib.*

18. — : — : —. Since plaintiff had a right to show that the value of the property was not totally destroyed, but that the mine could still be operated, an instruction that plaintiff, after taking defendant's property, could not insist upon his using the strip taken, either by a superstructure or by means of a subterranean device or by any other means which tended to increase the dangers to his employes or the inconveniences or dangers of operating the shaft which would make it difficult to get careful and prudent men to work in the mine, was misleading. *Ib.*

CONSIDERATION.

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CONSTITUTIONAL LAW.

1. CONSTITUTION: EXEMPTION FROM TAXATION: STATUTE. Under the state constitution, as it existed in 1853, the legislature could exempt the property of a college "from the payment of taxes for state or county purposes so long as the same or the proceeds thereof shall be used for or applied to educational purposes." (Acts, 1853, p. 569.) *The President & Faculty of St. Vincent's College v. Schaefer*, 261.
2. CONTRACT: EXEMPTION FROM TAXATION: CONSTITUTION. Such exemption constitutes a contract on the part of the state which, in the absence of a reserved right to do so, it cannot abrogate. *Ib.*
3. CONSTITUTION: JURISDICTION OF SUPREME COURT. In a case where one judgment embodies a finding against plaintiff as to three counts of the petition, involving more than \$2,500, and against defendant as to the fourth count, involving less than that sum, both parties appealing, the supreme court has jurisdiction to determine both appeals under the constitution of Missouri, article 6, section 12. *Ellis v. Harrison*, 270.
4. MARRIED WOMAN'S ACT: VESTED RIGHT: CONSTITUTION. The right of the husband to his wife's personal property and to reduce her choses in action to his possession is not a vested right and the act of March 25, 1875, is constitutional in its application to marriages existing at its date. *Hart v. Leete*, 315.
5. CONSTITUTION: TITLE OF ACT: ADDITIONAL TERMS OF COURT. The act of the legislature of April 11, 1889 (Laws, p. 68), entitled "An act to repeal section 1147, of article 4, chapter 23, of the Revised Statutes of Missouri, entitled 'circuit courts,' and to enact a new section to be numbered 1147 in lieu thereof, providing for the times and places of holding circuit courts in Audrain, Pike, Lincoln and Montgomery counties," provided for two additional terms of the circuit court to be held at Montgomery City, in Montgomery county, and which is not the county seat of said county, and also required the judge and clerk of the court to make the necessary preparations therefor. Held that the act is not in conflict with article 4, section 28, of the constitution, providing that no bill shall contain more than one subject which shall be clearly expressed in its title. *The State ex rel. Hughlett v. Hughes*, 459.
6. — : SPECIAL OR LOCAL LAW. Said act is not a special or local law, and, therefore, does not fall within the provisions of article 4, section 54, of the constitution, providing that "no local or special law shall be passed until notice of the intention to apply therefor shall have been published in the locality." *Ib.*

7. ———: REMOVAL OF COUNTY SEAT. Nor is said act in conflict with article 9, section 2, of the constitution, providing that "the general assembly shall have no power to remove the county seat of any county." *Ib.*
8. INJUNCTION: CONSTITUTIONALITY OF LAW. An injunction in the name of the state on the relation of the prosecuting attorney, against the circuit judge, the clerk and the sheriff, was a proper proceeding by which to test the constitutionality of the act. *Ib.*

CONSTRUCTION.

1. STATUTES: CONSTRUCTION: SUMMARY REMEDY. Statutes prescribing summary remedies against common law and common right should be strictly construed. *Judson v. Smith*, 61.
2. WRITTEN CONTRACT: AMBIGUITY: EVIDENCE. Where language of a written contract is ambiguous, the mutual construction given it by the parties is admissible to show their meaning. *Ellis v. Harrison*, 270.
3. ———: INTERPRETATION: INTENTION. The object of interpretation of instruments should be to reach the actual intention of the parties. *Ib.*

CONTINGENT REMAINDER.

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CONTINUANCE.

PRACTICE: CONTINUANCE. It is not error for the trial court to refuse a continuance because of the absence of a witness, where no diligence was used to procure his evidence at the trial. *Irwin v. Woodmansee*, 403.

CONTRACTS.

1. CONTRACT: PART PERFORMANCE: EVIDENCE. The acts relied on to show part performance of a contract to convey land, to take it out of the statute of frauds, should be clear and definite and be referable exclusively to the contract, and the latter must be established by competent evidence to be clear, definite and unequivocal in all its terms. *Rogers v. Wolfe*, 1.
2. ———: ———: ———. The evidence in this case reviewed and held not to meet the requirements of the foregoing rule. *Ib.*
3. ———: ———: HUSBAND AND WIFE: IMPROVEMENTS. A husband is bound to support and maintain his wife after marriage, and a promise to do so affords no consideration for a contract on her part to convey her lands to him, and such marriage will even cancel all claims on his part for improvements made on the land by him, under the alleged contract. *Ib.*
4. WRITTEN CONTRACT NOT VARIED BY ORAL AGREEMENT. The terms of a valid written instrument cannot, as a rule, be varied or contradicted by evidence of contemporaneous or prior oral agreements. *Tracy v. The Union Iron Works Co.*, 193.
5. NEGLIGENCE: CONTRACT: THIRD PERSON. A third person cannot maintain an action for injuries resulting from a breach of contract arising purely out of the terms of the agreement between the contracting parties. *Roddy v. The Mo. Pac. Ry. Co.*, 284.

6. ——— : BREACH OF CONTRACT : INJURY TO THIRD PERSON. Although the contract under which a railway company furnishes to a quarry owner, on his own sidetrack, cars for the transportation of stone requires it to see that the cars are provided with proper brakes, it is not liable to a servant of such quarry owner who is not a party to the contract, and over whom it has no control, for injuries resulting from the company's breach of its contract with the quarry owner. *Ib.*
7. ——— : ——— : LIABILITY TO THIRD PERSONS. Such contract, however, being for the mutual benefit of the quarry owner and the railroad company, the latter in furnishing the cars, which was a matter devolving exclusively on it, was bound to use ordinary care to furnish such as were reasonably safe for the quarry owner and his servants. *Ib.*
8. CONSTITUTION : EXEMPTION FROM TAXATION : STATUTE. Under the state constitution, as it existed in 1853, the legislature could exempt the property of a college "from the payment of taxes for state or county purposes so long as the same or the proceeds thereof shall be used for or applied to educational purposes." (*Acts, 1853, p. 569.*) *The President & Faculty of St. Vincent's College v. Schaefer*, 261.
9. CONTRACT : EXEMPTION FROM TAXATION : CONSTITUTION. Such exemption constitutes a contract on the part of the state which in the absence of a reserved right to do so, it cannot abrogate. *Ib.*
10. ——— : ——— : CONSIDERATION. The benefit which the legislature deemed the state would derive from the passage of the act constituted a sufficient consideration for the contract, and no other is required to support it. *Ib.*
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12. PARTIES : CONTRACT FOR BENEFIT OF THIRD PERSON. A person for whose benefit an express promise is made in a valid contract between others may in this state maintain an action thereon in his own name. *Ellis v. Harrison*, 270.
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14. PARTNERSHIP AGREEMENT : PAROL EVIDENCE. Where partnership articles provided that a firm should assume the "mercantile debts" of the then jobbing business of one of the partners, oral evidence was admissible of contemporaneous acts and declarations of the parties and of the opening entries in their firm books to prove the sense in which those terms were used. *Ib.*
15. WRITTEN CONTRACT : AMBIGUITY : EVIDENCE. Where language of a written contract is ambiguous, the mutual construction given it by the parties is admissible to show their meaning. *Ib.*
16. ——— : INTERPRETATION : INTENTION. The object of interpretation of instruments should be to reach the actual intention of the parties. *Ib.*

17. **CONTRACT : PAROL EVIDENCE : ILLEGAL CONSIDERATION.** A contract, under seal, in the form of one for sale of land may, in a suit for specific performance, be shown by parol evidence to be in fact a lease, made in violation of the statute against letting premises for bawdy-house purposes. (*Overruling Sprague v. Rooney*, 83 Mo. 498.) *Sprague v. Rooney*, 849.
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20. — : — : **NOTE.** The corporation held liable in this case on negotiable notes executed in its name by the president for the purchase price of mules. *Ib.*
21. — : **NEGOTIABLE NOTE : EXTRINSIC EVIDENCE.** Where, however, negotiable notes are signed by the president of the corporation in his own name, and nothing appears on the instrument to indicate he was acting as agent of the corporation, extrinsic evidence is inadmissible to show such agency. *Ib.*
22. **CONTRACT : PERSON USING ANOTHER NAME : ESTOPPEL.** A party may bind himself by another than his true name, where he executes an instrument with the intent to so bind himself, or where he uses a name by which he is shown to have held himself out to the world and carried on business. *Ib.*
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CORPORATIONS.

1. **CORPORATION, INSOLVENCY OF : ASSIGNMENT : DIRECTORS.** Where a corporation becomes insolvent it is the duty of the directors to make an assignment for the benefit of creditors. *Huse v. Ames*, 91.
2. — : — : —. The directors may authorize the vice-president to execute the deed of assignment. *Ib.*
3. — : — : —. The resolutions of the board in this case held sufficient to authorize the vice-president to execute such instrument. *Ib.*
4. **NOTE : BUSINESS UNDER FIRM-NAME.** Where one doing business in his individual name and also under a firm-name borrows money on the credit of both, and afterwards organizes a corporation and transfers all his assets to it, the inference is strong that the corporation assumed the debt. *The Bremen Sav. Bank v. The Branch-Crookes Saw Co.*, 425.

5. **CORPORATION: POWERS OF PRESIDENT: CONTRACTS BY.** The president of a corporation being its chief executive officer may, without any special authority from the board of directors, perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business. *Sparks v. The Dispatch Trans. Co.*, 581.
6. ——— : ——— : **NOTE.** The corporation *held* liable in this case on negotiable notes executed in its name by the president for the purchase price of mules. *Ib.*
7. ——— : **NEGOTIABLE NOTE: EXTRINSIC EVIDENCE.** Where, however, negotiable notes are signed by the president of a corporation in his own name and nothing appears on the instrument to indicate he was acting as agent of the corporation, extrinsic evidence is inadmissible to show such agency. *Ib.*
8. ——— : **PROMOTERS: TRUST AND CONFIDENCE.** Persons, usually called promoters, who project and form a corporation by soliciting and procuring others to subscribe for and take shares of stock for the purpose of selling to the corporation property which they own or have a right to acquire by executory contract, occupy a position of trust and confidence, and it devolves upon them to make full disclosures of their interest in and relation to the property. *The South Joplin Land Co. v. Case*, 572.
9. ——— : ——— : ———. Where the promoters form such association or initiate its formation, from that time they stand in a confidential relation to each other and to all others who may subsequently become members or subscribers, and it is not then competent for any of them to purchase property for the purpose of such a company and sell it at an advance without a free disclosure of the facts. *Ib.*

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CRIMINAL LAW.

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2. **CRIMINAL LAW: INDICTMENT: ROBBERY IN FIRST DEGREE.** It is not necessary to allege, in an indictment for robbery in the first degree, that the putting in fear was done feloniously. *State v. Brown*, 365.
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4. — : — : — : FELONIOUSLY. It is not necessary to use the word "feloniously" in the instructions, but, if used, its meaning should be defined. *Ib.*
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7. — : ROBBERY IN FIRST DEGREE : INSTRUCTION. An instruction on robbery in the first degree properly stated. *Ib.*
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10. — : —. An instruction in a criminal case is proper which tells the jury that the law presumes what defendants said against themselves to be true, but that the jury might believe or disbelieve what they said for themselves. *Ib.*
11. — : PETIT LARCENY. It is not error for the court, on a trial for robbery in the first degree, to omit to instruct as to petit larceny, where the evidence shows either robbery in the first degree or defendants' innocence. *Ib.*
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13. — : —. It is not even necessary that the person of the one upon whom the attempt is intended should be touched. If the intent with the present means of carrying it into effect exists and preparations therefor have been made the assault is complete. *Ib.*
14. — : —. It is immaterial in such case whether the sexual connection was to be accomplished by actual physical force or while the victim was asleep. *Ib.*
15. — : EVIDENCE : REPUTATION OF DEFENDANT. Where a defendant in such a case testifies in his own behalf, his general reputation for virtue and chastity may be assailed by the state. *Ib.*
16. CRIMINAL PRACTICE : REOPENING CASE : JUDICIAL DISCRETION. The refusal of the trial court to reopen the case to permit a defendant to offer additional evidence will not afford a ground for reversal, where it does not appear that the discretion of the court was unfairly or unsoundly exercised. *Ib.*
17. — : INSTRUCTIONS : ALIBI. The general instruction given to the jury in this case that if they had reasonable doubt of defendant's guilt they should acquit him *held* to have sufficiently embraced the law arising on the effect of the evidence offered tending to prove an *alibi.* *Ib.*

18. **CRIMINAL LAW: MURDER: INDICTMENT.** The averment in an indictment for murder that the fatal blow was given on a specified day, and that the deceased languished one hour and then died, sufficiently charges the date of the death. *State v. Luke*, 563.
19. ———: ———: ———. The indictment in this case *held* to sufficiently charge that the death of the deceased resulted from the effects of the blow inflicted by the defendant. *Ib.*
20. **CRIMINAL PRACTICE: POSTPONEMENT OF TRIAL: EXCEPTIONS.** The refusal of the trial court to postpone the further trial of the cause until the next day to enable the defendant to procure the attendance of an absent witness, will not be reviewed in the absence of exceptions duly saved. *Ib.*
21. **CRIMINAL LAW: HOMICIDE: INSTRUCTIONS.** The evidence in this case *held* to have authorized the court to instruct on murder in the second degree and on manslaughter in the second, third and fourth degrees. *Ib.*
22. **CRIMINAL PRACTICE: INSTRUCTIONS.** It is not error for the court to refuse instructions embodying the same principle as those already given. *Ib.*
23. ———: ———. Where the instructions asked in a criminal case may confuse the jury, it is the duty of the court to give in lieu of them an appropriate one on the issue of fact involved. *Ib.*
24. ———: **NEW TRIAL: NEWLY-DISCOVERED EVIDENCE.** Where on an application for a new trial because of newly-discovered evidence its materiality, or the effort which had been made to discover it in time for the trial, does not appear, the new trial is properly denied. *Ib.*
25. ———: **VARIANCE: EXCEPTIONS.** Under Revised Statutes, 1879, section 1820, the objection of variance between the charge in the indictment and proof of the description of anything named therein must be specially raised in the trial court and exceptions thereto duly saved. *State v. Ballard*, 634.
26. ———: **FAILURE OF PROOF.** Where, however, the evidence shows a total failure of proof of defendant's guilt, the supreme court will review the same, although the attention of the trial court was not specially called thereto. *Ib.*
27. ———: ———. The evidence in this case examined and *held* to show an entire failure of proof that defendant was guilty of the larceny of the cow as charged. *Ib.*
28. ———: ———. The evidence in a criminal case which merely raises a suspicion of guilt is insufficient to sustain a conviction. *Ib.*
29. **CRIMINAL LAW: NEGLIGENT SHOOTING: MANSLAUGHTER.** Where one carelessly handles a loaded shotgun, and without examining to see whether it is loaded, points it at another, and, unintentionally, but negligently, and with a recklessness incompatible with a proper regard for human life, shoots him, he is guilty of manslaughter in the fourth degree. *State v. Morrison*, 638.
30. **CRIMINAL PRACTICE: DEFENDANT AS WITNESS: INSTRUCTION.** Where, on a trial for murder, defendant has testified in his own behalf, it is not error to instruct the jury that they *should* consider the fact in weighing the evidence, that defendant is the prisoner on trial. *Ib.*

81. CRIMINAL LAW : SEDUCTION UNDER PROMISE OF MARRIAGE : CORROBORATING EVIDENCE. On a trial of an indictment for the seduction of a woman under promise of marriage, she must, under Revised Statutes, 1879, section 1913, be corroborated as to the promise by other evidence than that given by herself. *State v. McCaskey*, 644.
82. ——— : ——— : GOOD REPUTE. The duty is on the state in such case to allege and prove that she was a woman of good repute. *Ib.*
83. CRIMINAL PRACTICE : INSTRUCTIONS. Instructions should not refer the jury to the indictment to determine what they must find in order to convict. *Ib.*

DAMAGES.

1. CRIME, CIVIL ACTION FOR : MERGER. The right of action for an injury done in the commission of a felony or misdemeanor is not merged in the public offense. (R. S. 1879, sec. 1673.) *Gray v. McDonald*, 303.
2. ——— : ———. A criminal prosecution by the state, and a civil action for damages arising from the same act, may be carried on at the same time against the same defendant. *Ib.*
3. ——— : ———. A judgment of acquittal in the public prosecution will constitute no defense in the civil suit for the same defendant, nor his abettor. *Ib.*
4. THIRD SECTION OF DAMAGE ACT : CAUSE OF ACTION. Under Revised Statutes, 1879, section 2122, known as the third section of the damage act, the cause of action survives to the designated person, if the injured party would have had a common-law or statutory right of action, if death had not ensued. *Ib.*
5. ——— : ———. A new cause of action is not created by said section. *Ib.*
6. ——— : ABETTOR OF HOMICIDE. When one is present at a homicide, exciting and encouraging the battery that results in the killing, he becomes a party to the wrongful act, and is liable to an action for damages under section 2122, *supra*, the same as the actual slayer. *Ib.*
7. ——— : ———. The evidence in this case considered and held to support the verdict on the issue that the defendant was present exciting and encouraging the homicide. *Ib.*
8. ——— : CONTRIBUTORY NEGLIGENCE OF DECEASED. Contributory negligence of the deceased is no defense to an action by a widow under Revised Statutes, 1879, sections 2122, 2123, for the intentional killing of her husband. *Ib.*
9. ——— : EXEMPLARY DAMAGES. Exemplary as well as actual damages may be recovered in such action. *Ib.*

DEBTOR AND CREDITOR.

1. NOTE : ASSUMPTION OF DEBT : ESTOPPEL. The defendant corporation was sued on a note purporting to be signed by it as maker and one B., as indorser. It defended in its answer on the grounds that it was a manufacturing and business corporation ; that its name was used by B. the then president of the corporation, for his own accommodation, and for the purpose of satisfying his prior individual debt ; that the note was so executed without any

consideration moving to the defendant; and that the plaintiff, when it accepted the note, had knowledge of the foregoing facts. *Held* that if the plaintiff was induced by defendant's conduct under the circumstances to believe in good faith that the defendant had assumed to pay the debt, though it did not, in fact, assume to pay it, defendant was liable. *The Bremen Sav. Bank v. The Branch-Crookes Sav Co.*, 425.

2. ——— : ——— : ——— : PLEADING. Such liability, although resting on estoppel, could be shown under a replication in the form of a general denial to the answer. *Ib.*
3. ——— : ———. Where one doing business in his individual name and also under a firm-name borrows money on the credit of both, and afterwards organizes a corporation and transfers all his assets to it, the inference is strong that the corporation assumed the debt. *Ib.*
4. SURETY : EXTENSION OF TIME TO DEBTOR : RELEASE OF DEBT. A contract between debtor and creditor for an extension of time of payment for any definite period, without consent of the surety, discharges the latter. *Barrett v. Davis*, 549.
5. ——— : ——— : CONSENT OF SURETY. Where such agreement is made upon condition that the surety assents thereto, it does not discharge the latter. *Ib.*
6. ——— : ——— : ———. Such condition may be verbal and collateral to a written agreement. *Ib.*
7. WRITTEN CONTRACT : EVIDENCE. Facts showing that a writing never acquired original vitality as a contract are admissible in evidence. *Ib.*
8. MARRIED WOMAN : SEPARATE ESTATE : SURETYSHIP : EXTENSION OF TIME TO DEBTOR. A married woman, as to her separate estate, is, in equity, held competent to consent to an extension of a debt for which her estate stands as surety, or to ratify such an extension as indicated below. *Ib.*

DEEDS.

1. DEED : ACKNOWLEDGMENT : STATUTE. The provisions of the act of 1883 (Laws, p. 26) prescribing the form for acknowledgments of conveyances of real estate are cumulative. *Huse v. Ames*, 91.
2. ——— : DELIVERY OF : LIFE OF GRANTOR. The delivery of a deed is an essential element in a valid transfer of title to real estate and it must take place during the life of the grantor; for a deed cannot be made to perform the functions of a will. *Sneathen v. Sneathen*, 201.
3. ——— : DELIVERY TO THIRD PERSON. The delivery, however, need not be made to the grantee in person. *Ib.*
4. ——— : ———. A deed delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, will constitute a good delivery, though the grantor is dead at the date of the last delivery; for the delivery takes effect by relation as of the date when first made to the third person. *Ib.*
5. ——— : ———. It should appear in the foregoing case that the grantor parted with all dominion and control over the instrument, intending it to take effect and pass title as a present transfer, and this intention may be indicated by acts or words, or by both. *Ib.*

6. ——— : ———. The rule that the grantor must part with all dominion and control over the deed does not mean that he must put it out of his physical power to procure repossession of it. *Ib.*
7. ——— : WIFE OF GRANTOR. The wife of the grantor may be the third person to whom the grantor can deliver a deed for the grantee. *Ib.*
8. ——— : ACCEPTANCE: INFANT GRANTEES: PRESUMPTION OF. When the grantees are infants the law presumes assent on their part to a beneficial conveyance, and knowledge of the same and its delivery are not essential. *Ib.*
9. EVIDENCE: DEED, RECITALS IN. Evidence tending to show how land was occupied, and the line to which it was claimed, *held* not incompetent as contradicting the recitals in a deed. *Irwin v. Woodmansee*, 408.
10. TAX DEED: FORM PRESCRIBED BY STATUTE. Where the statute prescribes a particular form for a tax deed, such form becomes substance and must be strictly followed or the deed will be void. *Pitkin v. Reibel*, 505.
11. TAX SALE: ASSIGNEE OF PURCHASER: DEED: STATUTE. The revenue act of 1872 (2 Wag. Stat., pp 1205-6, sec. 207) makes certificates of purchases at tax sales assignable "by indorsement thereon under the hand of the purchaser." Section 216 authorizes the collector to make a deed to the assignee, but requires the deed to recite the fact of the assignment; and section 217, prescribing the form of the deed, requires a recital that the indorsement was under the hand of the purchaser written on the back of the certificate of purchase. *Held* that the deed simply reciting that the purchaser had assigned to the grantees all his "right, title and interest in and to said land" was void because not substantially complying with the statute. *Ib.*
12. TAX DEED: LIMITATION. The tax deed being void, the statute of limitations, provided by section 221 of said act of 1872, did not run. *Ib.*
13. ——— : SUCCESSFUL CLAIMANT: REIMBURSEMENT OF TAXES PAID. Recovery can be had for taxes paid, by an assignee or person claiming under the purchaser at the tax sale, under section 219 of said act of 1872, which provides that if the holder of a tax deed or one claiming under him by virtue thereof be defeated in an action for recovery of the land he may recover of the successful party "the full amount of the taxes paid by the tax purchaser at the time of the purchase and all the subsequent taxes paid by him," interest, etc. *Ib.*
14. ——— : ——— : ———. Though the tax deed is insufficient to transfer title, still it is sufficient evidence of the assignment to enable the grantee to recover the taxes paid. *Ib.*
15. DEED: ACKNOWLEDGMENT, IMPEACHMENT OF. In Missouri, a certificate of acknowledgment of a conveyance of land may be avoided by evidence of its falsity; but there should be a clear preponderance of evidence to warrant such a finding. *Barrett v. Davis*, 549.

DELINQUENT TAXES.

See TAXATION, 5.

DELIVERY.

See DEEDS, 2, 3, 4, 5, 6, 7, 8.

DEPARTURE.

See PRACTICE, CIVIL, 45.

DEPUTY.

See OFFICES AND OFFICERS, 8.

DISTRESS WARRANT.

1. STATUTES : CONSTRUCTION : DELINQUENT COUNTY COLLECTOR : DISTRESS WARRANT : INJUNCTION. Where statutes providing for the collection of the revenue require monthly payments to be made by collectors and authorize the issuance of a distress warrant by the state auditor for failure to comply with that requirement, and also require such collectors to make yearly settlements and payments, and likewise empower the state auditor to issue distress warrants against delinquents and their sureties immediately after the delinquency shall occur, the state auditor cannot issue a distress warrant against a delinquent collector and his sureties eighteen months after the collector's term of office has expired, and where it has been so issued injunction will lie to restrain execution. *Judson v. Smith*, 61.
2. ——— : ——— : ——— : ——— : ———. Where the form of a distress warrant given by the statute in such cases is for the collection of the revenue for one year, the warrant cannot be issued for the collection for two years. *Ib.*
3. ——— : ——— : ——— : ——— : ———. TRESPASS. The issuance of a distress warrant, under any other circumstances than those authorized by statute, will make the officer issuing it a trespasser. *Ib.*

DOWER.

1. COVENANT OF WARRANTY : DOWER : NOMINAL DAMAGES. Only nominal damages are recoverable for breach of warranty of title by reason of an outstanding inchoate right of dower. *Blevins v. Smith*, 583.
2. BACK TAXES : DOWER. A sale under a judgment for delinquent taxes does not bar a widow's right of dower where she was not made a party to the tax suit, and this is true although such right of dower is only inchoate. *Ib.*

EJECTMENT.

FRAUDULENT CONVEYANCE : EJECTMENT. A conveyance made in fraud of creditors is void and will not bar a recovery in ejectment. *Snell v. Harrison*, 158.

ELECTIONS.

1. MANDAMUS : OFFICER : ELECTION. Where a pending election contest affords one a sufficiently plain and specific remedy to have his right to an office determined, he cannot resort to *mandamus*. *The State ex rel. Clark v. Smith*, 661.
2. CONTESTED ELECTION CASE : NOTICE. The notice of contest initiates the proceeding in a contested election case. *Ib.*

3. **MANDAMUS: PRACTICE.** A motion, for a peremptory writ of *mandamus* notwithstanding the return of respondent, operates as a demurrer to such return. *Ib.*

EMINENT DOMAIN.

See CONDEMNATION PROCEEDINGS.

EQUITY.

1. **MORTGAGE: FORECLOSURE: EQUITY.** A mortgagor can in this state maintain a bill in equity for the foreclosure of the mortgage. *Wolff v. Ward*, 127.
2. ———: ———: ———. The petition in this case examined and *held* to be a bill in equity to foreclose a mortgage and to state facts sufficient to constitute a good cause of action in equity. *Ib.*
3. **EQUITY: LAND: CLOUD ON TITLE.** A court of equity will entertain a bill to remove a cloud on title to land in behalf of persons not in possession, if they have no adequate remedy at law. *Sneathen v. Sneathen*, 201.
4. ———: ———: ———. The jurisdiction in equity to remove a cloud on title is not only remedial but preventive. *Ib.*
5. **MARRIED WOMAN: PERSONAL PROPERTY: HUSBAND'S RIGHTS AT COMMON LAW: EQUITY.** While by the common law marriage vested in the husband absolutely all her articles of personal property then owned or thereafter acquired by the wife, yet in equity the husband could waive his right thereto and permit her to retain the same free from any claim on his part. *Hart v. Leete*, 315.

ESTOPPEL.

1. **PRACTICE IN SUPREME COURT: ESTOPPEL.** Parties in the appellate court are bound by the positions assumed by them in the trial court. *Tomlinson v. Ellison*, 103.
2. **ATTACHMENT: ESTOPPEL.** Where two attachments are levied on the same land and it is sold under both, the fact that the prior attaching creditor obtains an order to have the surplus proceeds arising from the sale under the junior attachment applied to the satisfaction of his debt does not estop him, as against the holder of a fraudulent deed of trust given before any of the attachments, from claiming to be the prior attaching creditor. *Stanton v. Boschert*, 393.
3. **CONTRACT: PERSON USING ANOTHER NAME: ESTOPPEL.** A party may bind himself by another than his true name, where he executes an instrument with the intent to so bind himself, or where he uses a name by which he is shown to have held himself out to the world and carried on business. *Sparks v. The Dispatch Trans. Co.*, 531.

See DEBTOR AND CREDITOR, 1, 2.

EVIDENCE.

1. **SALE: PRINCIPAL AND AGENT: EVIDENCE.** The acts, declarations and admissions of an agent in reference to the business of the principal with which he has been intrusted, if made while engaged in its execution, or so soon thereafter as to constitute a part of the transaction, will bind the principal and are admissible in evidence against him. *Bergeman v. The Indianapolis & St. L. Ry. Co.*, 71.

2. ——— : ——— : ———. When the acts of the agent will bind the principal, his declarations respecting the subject-matter will also bind him, if made at the time. *Ib.*
3. WRITTEN CONTRACT NOT VARIED BY ORAL AGREEMENT. The terms of a valid written instrument cannot, as a rule, be varied or contradicted by evidence of contemporaneous or prior oral agreements. *Tracy v. The Union Iron Works Co.*, 193.
4. EVIDENCE : INCREDIBLE STATEMENT. A statement in evidence may be so contradictory of general knowledge that no court is bound to believe it. *Gurley v. The Mo. Pac. Ry. Co.*, 211.
5. PARTNERSHIP AGREEMENT : PAROL EVIDENCE. Where partnership articles provided that a firm should assume the "mercantile debts" of the then jobbing business of one of the partners, oral evidence was admissible of contemporaneous acts and declarations of the parties and of the opening entries in their firm books to prove the sense in which those terms were used. *Ellis v. Harrison*, 270.
6. WRITTEN CONTRACT : AMBIGUITY : EVIDENCE. Where language of a written contract is ambiguous, the mutual construction given it by the parties is admissible to show their meaning. *Ib.*
7. CONTRACT : PAROL EVIDENCE : ILLEGAL CONSIDERATION. A contract, under seal, in the form of one for sale of land may, in a suit for specific performance, be shown by parol evidence to be in fact a lease, made in violation of the statute, against letting premises for bawdy-house purposes. (*Overruling Sprague v. Rooney*, 82 Mo. 493.) *Sprague v. Rooney*, 349.
8. ——— : ——— : PLEADING. Such parol evidence was admissible under the general denial of the answer. *Ib.*
9. EVIDENCE : DEED, RECITALS IN. Evidence tending to show how land was occupied, and the line to which it was claimed, held not incompetent as contradicting the recitals in a deed. *Irwin v. Woodmansee*, 403.
10. RAPE, ASSAULT TO COMMIT : EVIDENCE : REPUTATION OF DEFENDANT. Where a defendant in a case of assault to commit rape testifies in his own behalf, his general reputation for virtue and chastity may be assailed by the state. *State v. Shroyer*, 441.
11. NEGLIGENCE : ALLEGATIONS AND PROOF. Evidence that the company's servants in charge of a train discovered plaintiff's peril in time to have averted the injury is admissible under the averments of the petition, that the defendant's agents negligently moved and managed the train by which the injury was occasioned. *Dickson v. The Mo. Pac. Ry. Co.*, 491.
12. CORPORATION : NEGOTIABLE NOTE : EXTRINSIC EVIDENCE. Where, however, negotiable notes are signed by the president of a corporation in his own name and nothing appears on the instrument to indicate he was acting as agent of the corporation, extrinsic evidence is inadmissible to show such agency. *Sparks v. The Dispatch Trans. Co.*, 531.
13. WRITTEN CONTRACT : EVIDENCE. Facts showing that a writing never acquired original vitality as a contract are admissible in evidence. *Barrett v. Davis*, 549.

EXTENSION OF TIME.

See DEBTOR AND CREDITOR, 4, 5, 6, 8.

FELLOW SERVANTS.

See MASTER AND SERVANT, 4, 5.

FORECLOSURE.

See MORTGAGES AND DEEDS OF TRUST, 1, 2, 6, 7.

FRANCHISES.

See RAILROADS, 31.

FRAUD.

1. SALE: FRAUD: RESCISSION BY VENDOR: RIGHT OF STOPPAGE IN TRANSITU. A vendor who by the contract of sale is to keep the possession of the property sold, until the purchase price is paid, has the right, where the vendee gets possession by improper means, making it tortious, to retake the property and place himself in the position where the contract left him, and this he may do without restoring to the vendee a part of the purchase price paid at the time of the sale. *Bergeman v. The Indianapolis & St. L. Ry. Co.*, 77.
2. ———: ———: ———: ———: STATUTE. Section 2505, Revised Statutes, 1879, has no application to a case where a vendee fraudulently obtains possession of personal property sold before payment of the purchase price and sells it to a third party to whom it is consigned, and the original vendor exercises his right of stoppage *in transitu*, where the contest is between the last purchaser and the carrier for the value of the property which it failed to deliver. *Ib.*
3. ———: PRINCIPAL AND AGENT: FRAUD: EVIDENCE. Evidence that an agent, who bought property from one who had fraudulently obtained possession of it under a contract of purchase, was an old acquaintance of his vendor, that the conduct of the sale was unusual, that the payment by the agent was not according to the usual custom, that when charged with knowledge of the fraud he made no denial, and that, although present at the trial, he was not called as a witness, will justify the submission to the jury of the question whether the agent knew of the fraud. *Ib.*
4. ———: ———: ———: NOTICE. Where the only right a vendor has to the possession of the property sold is a statement fraudulently obtained, knowledge by the agent of the buyer that this statement was false, will prevent his principal from being an innocent purchaser. *Ib.*
5. FRAUDULENT CONVEYANCE: EJECTMENT. A conveyance made in fraud of creditors is void and will not bar a recovery in ejectment. *Snell v. Harrison*, 158.
6. ———: BADGES OF FRAUD. An unusual method of transacting business is a badge of fraud. *Ib.*
7. CONVEYANCE: UNDUE INFLUENCE. The charge that a conveyance of land was obtained by the fraud, compulsion and undue influence of the wife of the grantor *held* not to be proved. *Sneathen v. Sneathen*, 201.
8. FRAUDULENT CONVEYANCE. The evidence in this case examined and *held* to show that a deed of trust executed by the debtor was made in fraud of creditors. *Stanton v. Boschert*, 393.

9. FRAUDULENT CONVEYANCE: EVIDENCE. *Fulkerson v. Sappington*, 472.

FRAUDULENT CONVEYANCE.

See FRAUD, 5, 6, 7, 8, 9.

GIFTS.

See GIFTS CAUSA MORTIS.

HUSBAND AND WIFE, 4, 5.

GIFTS CAUSA MORTIS.

1. GIFTS CAUSA MORTIS: DELIVERY. A legal essential to delivery of gifts in view of death is, that there shall be some manifestation of an executed purpose to deliver. A mere intent to deliver is not sufficient. Something must be done to show that the intent has been carried into effect. *Tomlinson v. Ellison*, 108.
2. ———: ———. A gift *causa mortis* will fail in the absence of a delivery of the subject of the gift, or, at least, of the evidence of title thereto. *Ib.*
3. ———: ———. Delivery of a gift *causa mortis* may be made to one person for the benefit of another. But delivery by the donor to his agent of a document, as evidence of title to certain notes given by the donor to his brother, to be placed among the donor's other papers in the agent's possession, without directions to deliver to the donee, the instrument remaining in the agent's hands until after the donor's death, will not constitute delivery of the subject-matter of the gift. *Ib.*

HABEAS CORPUS.

1. HABEAS CORPUS: DISCHARGE: JUDGMENT OF COMPETENT COURT. A prisoner detained by the final judgment of a competent court of criminal jurisdiction, upon conviction for selling intoxicating liquors in violation of the local-option law, will not be discharged on *habeas corpus* upon the ground that such law had never been legally adopted, that being a question that the trial court had jurisdiction to determine, and from whose decision an appeal would lie. *Ex parte Mitchell*, 121.
2. ———: APPEAL: WRIT OF ERROR. The writ of *habeas corpus* is not the remedy for the correction of the errors of trial courts, and cannot be substituted for appeals and writs of error. *Ib.*

HOMESTEADS AND EXEMPTIONS.

1. HOMESTEAD: HUSBAND AND WIFE. Where the husband is the head of the family, and both he and his wife have an interest in the same tract of land, each interest exceeding in value the homestead exemption, and the husband is the debtor, the homestead exemption will be allowed him out of his interest. *Hart v. Leete*, 815.
2. ———: FRAUDULENT CONVEYANCE. Creditors cannot complain of the conveyance of a homestead having been made in fraud of their rights. *Ib.*

HOMICIDE.

See DAMAGES, 6, 7.

HUSBAND AND WIFE.

1. **CONTRACT: PART PERFORMANCE: HUSBAND AND WIFE: IMPROVEMENTS.** A husband is bound to support and maintain his wife after marriage, and a promise to do so affords no consideration for a contract on her part to convey her lands to him, and such marriage will even cancel all claim on his part for improvements made on the land by him, under the alleged contract. *Rogers v. Wolfe*, 1.
2. **MARRIED WOMAN: SEPARATE ESTATE.** While no particular or technical words are necessary to create a separate estate in a wife, yet the intent to exclude the husband's common-law rights must clearly appear. *Hart v. Leete*, 815.
3. ——— : ———. A devise of land by a testator to his two daughters "in their own rights" does not create a separate estate. *Ib.*
4. ——— : **GIFT OF STOCK OR BONDS: STATUTE.** The provision of General Statutes of 1865, chapter 115, section 19, that "any property consisting of stocks and bonds of any kind given by a parent to a daughter shall with the proceeds thereof belong to such daughter if married, in her own right, and shall not be subject to the payment of the debts of her husband and may be disposed of by such married daughter the same as if unmarried," applies only where there is a specific gift of the stocks or bonds as such. *Ib.*
5. ——— : ——— : ———. Where a testator bequeaths to his daughter one-fifth of his estate and large sums are paid by the executors in distribution to her husband, the fact that such money is derived from dividends and interest on stocks and bonds will not, under said statute, deprive the husband of his marital rights therein. *Ib.*
6. ——— : **PERSONAL PROPERTY: HUSBAND'S RIGHTS AT COMMON LAW: EQUITY.** While by the common law marriage vested in the husband absolutely all her articles of personal property then owned or thereafter acquired by the wife, yet in equity the husband could waive his right thereto and permit her to retain the same free from any claim on his part. *Ib.*
7. ——— : **CHOSE IN ACTION.** A wife's chose in action did not vest in the husband by virtue of the marriage alone, but it was necessary for him to reduce it to possession to become the owner. *Ib.*
8. ——— : ——— : **LEGACY.** A legacy or distributive share coming from the estate of a decedent is a chose in action. *Ib.*
9. ——— : **HUSBAND RECEIVING WIFE'S MONEY.** Where the husband collects the money due upon his wife's choses in action, not as agent or trustee, but for the purpose of devoting it to his own use, there can be no doubt but this constitutes a reduction to his possession, and the money then becomes his own and liable for his debts. *Ib.*
10. **MARRIED WOMAN'S ACT: PROPERTY PREVIOUSLY REDUCED TO HUSBAND'S POSSESSION.** The act of March 25, 1875 (R. S. 1879, sec. 3296), did not attempt to reinvest the wife with title to property which the husband had reduced to possession, nor was it in the power of the legislature to deprive him of property which had become his own. *Ib.*

11. ——— : **EXISTING MARRIAGES.** Said act of March 25, 1875, secures to the wife her personal property and rights in action and applies to all cases where the husband had not, at the date of said act, possessed himself of his wife's personal property, no matter when the marriage took place. *Ib.*
12. ——— : **VESTED RIGHT : CONSTITUTION.** The right of the husband to his wife's personal property and to reduce her choses in action to his possession is not a vested right, and said act of March 25, 1875, is constitutional in its application to marriages existing at its date. *Ib.*
13. ——— : **"WRITTEN ASSENT" OF WIFE.** Under said act of 1875 the husband cannot acquire any interest in the wife's property, except on her assent in writing as provided in said statute, and her money received by him after the going into operation of said act will be deemed to be held in trust for her in the absence of such assent in writing on her part. *Ib.*
14. **HOMESTEAD : HUSBAND AND WIFE.** Where the husband is the head of the family and both he and his wife have an interest in the same tract of land, each interest exceeding in value the homestead exemption, and the husband is the debtor, the homestead exemption will be allowed him out of his interest. *Ib.*
15. ——— : **FRAUDULENT CONVEYANCE.** Creditors cannot complain of the conveyance of a homestead having been made in fraud of their rights. *Ib.*
16. **MARRIED WOMAN : SETTLEMENT.** Where a wife's funds have become fully vested in the husband, a court will not divest them to make a settlement for her support. *Ib.*
17. ——— : **DEBTS DUE HER : FRAUDULENT CONVEYANCE.** A debt due a wife from a husband stands on the same footing as debts due any other person, and he may even give her a preference over the latter, but he cannot convey his property to her in fraud of his creditors. *Ib.*

IMPROVEMENTS.

See **HUSBAND AND WIFE**, 1.

INFANTS,

See **DEEDS**, 8.

PARTIES 1, 2.

INDICTMENT.

See **PLEADING, CRIMINAL**.

INJUNCTION.

1. **TRADE-MARK : INFRINGEMENT : INJUNCTION.** One who has appropriated a trade-mark has a property right in it which will be protected against infringement by injunction. *Liggett & Meyers Tobacco Co. v. Sam Reid Tobacco Co.*, 53.
2. ——— : **CASE STATED.** Plaintiff had, for many years, made tobacco, to each plug of which it attached six five-pointed stars made of tin with a hole in the center. After its tobacco had become well known as the "Star" brand, defendant put on the market a "buzz-saw" tobacco, to which is attached a tin symbol

of the same size as the plaintiff's with eight points, slightly inclined to the right, a hole in the center and the words "Buzz" dimly impressed on the surface. It is attached to the plug the same as the star of the plaintiff. *Held* that the "Buzz-saw" symbol was an infringement of plaintiff's trade-mark, and that its use should be enjoined. *Ib.*

3. STATUTES : CONSTRUCTION : DELINQUENT COUNTY COLLECTOR : DISTRESS WARRANT : INJUNCTION. Where statutes providing for the collection of the revenue require monthly payments to be made by collectors and authorize the issuance of a distress warrant by the state auditor for failure to comply with that requirement, and also require such collectors to make yearly settlements and payments, and likewise empower the state auditor to issue distress warrants against delinquents and their sureties immediately after the delinquency shall occur, the state auditor cannot issue a distress warrant against a delinquent collector and his sureties eighteen months after the collector's term of office has expired, and where it has been so issued injunction will lie to restrain execution. *Judson v. Smith*, 61.
4. — : — : — : — : —. Where the form of a distress warrant given by the statute in such cases is for the collection of the revenue for one year, the warrant cannot be issued for the collection for two years. *Ib.*
5. — : — : — : — : — : TRESPASS. The issuance of a distress warrant, under any other circumstances than those authorized by the statute, will make the officer issuing it a trespasser. *Ib.*
6. INJUNCTION : CONSTITUTIONALITY OF LAW. An injunction in the name of the state on the relation of the prosecuting attorney against the circuit judge, the clerk and the sheriff, is a proper proceeding by which to test the constitutionality of an act providing for holding additional terms of circuit court at a place other than the county seat. *The State ex rel. Hughlett v. Hughes*, 459.

INNOCENT PURCHASER.

See FRAUD, 4.

INSTRUCTIONS.

1. PRACTICE : INSTRUCTIONS. Where a cause has been fairly submitted to the jury under instructions given by the court, nothing more should be required, and the appellate court will not critically examine instructions refused in order to discover one that might appropriately have been given. *Bergeman v. The Indianapolis & St. L. Ry. Co.*, 77.
2. — : —. Instructions embodying abstract propositions of law correct in themselves should not be given when not predicated upon the evidence in the particular case to be determined. *Ib.*
3. — : —. Instructions which taken as a whole properly present the law of the case to the jury are not objectionable. *Shortel v. The City of St. Joseph*, 114.
4. — : — : CLERICAL ERROR. Clerical errors in an instruction, which are readily discovered upon a reading of it, will not constitute reversible error. *Ib.*

5. ———: INSTRUCTIONS. Instructions should be complete in themselves, and not remit the jury to the pleadings to ascertain their scope or meaning. *The Chicago, S. F. & C. Ry. Co. v. McGrew*, 282.
6. ———: ———: ASSUMPTION OF FACT. The assumption in an instruction of a fact of which there is some proof and no controverting evidence will not constitute reversible error. *Dickson v. The Mo. Ry. Pac. Co.*, 491.
7. — — : ———. Instructions are properly refused when they do not conform to the pleadings and evidence in the case. *Sparks v. The Dispatch Trans. Co.*, 531.
8. CRIMINAL PRACTICE : INSTRUCTIONS. It is not error for the court to refuse instructions embodying the same principle as those already given. *State v. Luke*, 568.
9. ———: ———. Where the instructions asked in a criminal case may confuse the jury, it is the duty of the court to give in lieu of them an appropriate one on the issue of fact involved. *Ib.*
10. ———: ———. Instructions should not refer the jury to the indictment to determine what they must find in order to convict. *State v. McCaskey*, 644.

JOINT TENANCY.

JOINT TENANCIES : STATUTE. While joint tenancies are not abolished in this state, still, under General Statutes. 1865, page 443, section 12, to create such a tenancy there must be an express declaration to that effect in the instrument creating the estate. *Rodney v. Landau*, 251.

JUDGMENTS.

1. CRIME, CIVIL ACTION FOR : MERGER. A judgment of acquittal in the public prosecution will constitute no defense in the civil suit for the same defendant, nor for his abettor. *Gray v. McDonald*, 803.
2. JUDGMENT, FINALITY OF : MOTION FOR NEW TRIAL. A judgment is not considered a finality for the purposes of review during the pendency of a motion for a new trial. *The State ex rel. Scott v. Smith*, 419.

JURISDICTION.

1. CONSTITUTION : JURISDICTION OF SUPREME COURT. In a case where one judgment embodies a finding against plaintiff as to three counts of the petition, involving more than \$2,500, and against defendant as to the fourth count, involving less than that sum, both parties appealing, the supreme court has jurisdiction to determine both appeals under the constitution of Missouri, article 6, section 12. *Ellis v. Harrison*, 270.
2. JURISDICTION. By jurisdiction of the subject-matter of a cause is meant jurisdiction over the general class of actions to which it belongs. *The State ex rel. Scott v. Smith*, 419.
3. ———: COURT OF APPEALS : WRIT OF ERROR. Where a court of appeals has jurisdiction of the subject-matter of an action, the question whether the writ of error therein was issued within the statutory period is one peculiarly for that court to decide, and its ruling thereon is not reviewable by prohibition. *Ib.*

LAND AND LAND TITLES.

1. **TENANTS IN COMMON: PURCHASE OF OUTSTANDING TITLE.** While one tenant in common cannot buy in an adverse paramount title so as to oust his cotenant, yet it seems the foregoing rule is not applicable where the tenant buys in the independent interest of another tenant in common similarly situated as himself. *Snell v. Harrison*, 158.
2. **EQUITY: LAND: CLOUD ON TITLE.** A court of equity will entertain a bill to remove a cloud on title to land in behalf of persons not in possession, if they have no adequate remedy at law. *Sneathen v. Sneathen*, 201.
3. ———: ———: ———. The jurisdiction in equity to remove a cloud on title is not only remedial but preventive. *Ib.*
4. **THE TITLE TO THE LAND** in controversy in this case having been passed on in *Macklin v. Allenberg*, 100 Mo. 387, and no reason appearing for disturbing the ruling therein, the judgment in that case is affirmed. *Macklin v. Schmidt*, 361.

LANDLORD AND TENANT.

MONTHLY TENANCY: NOTICE TO QUIT: STATUTE. Section 6871 of Revised Statutes of 1889, requiring one month's notice to terminate leases, not in writing, of stores, shops, houses and other buildings in cities, towns and villages, applies to premises used as a park with buildings and fixtures thereon, situate in a city and not leased for purposes of cultivation. *Withnell v. Petzold*, 409.

LEGACY.

See CHOSSES IN ACTION, 2.

LIENS.

1. **ATTACHMENT OF LAND: LIEN.** The filing in the recorder's office by the sheriff of an abstract of the attachment, as required by Revised Statutes, 1879, section 420, is necessary to perfect an attachment lien on land. *Stanton v. Boschert*, 393.
2. ———: **ESTOPPEL.** Where two attachments are levied on the same land and it is sold under both, the fact that the prior attaching creditor obtains an order to have the surplus proceeds arising from the sale under the junior attachment applied to the satisfaction of his debt does not estop him, as against the holder of a fraudulent deed of trust given before any of the attachments, from claiming to be the prior attaching creditor. *Ib.*

See MECHANIC'S LIENS.

LIMITATIONS.

TAX DEED: LIMITATION. A tax deed being void the statute of limitations provided by section 221 of the act of 1872 will not run. *Pitkin v. Reibel*, 505.

LOCAL LAW.

See CONSTITUTIONAL LAW, 3.

MANDAMUS.

1. **MANDAMUS: OFFICER.** The remedy by *mandamus* is allowable against a public officer only in case the person seeking its benefit is directly interested in the performance of the matter demanded, and has no other adequate, specific and effective remedy at law. *The State ex rel. Clark v. Smith*, 661.

2. ——— : ———. Where a pending election contest affords one a sufficiently plain and specific remedy to have his right to an office determined, he cannot resort to *mandamus*. *Ib.*
3. ——— : PRACTICE. A motion, for a peremptory writ of *mandamus*, notwithstanding the return of respondent, operates as a demurrer to such return. *Ib.*

MANSLAUGHTER.

CRIMINAL LAW : NEGLIGENT SHOOTING : MANSLAUGHTER. Where one carelessly handles a loaded shotgun, and, without examining to see whether it is loaded, points it at another, and unintentionally, but negligently, and with a recklessness incompatible with a proper regard for human life, shoots him, he is guilty of manslaughter in the fourth degree. *State v. Morrison*, 688.

See CRIMINAL LAW, 21.

MARRIAGE.

MARRIAGE, SUFFICIENT EVIDENCE OF. The evidence in this case is deemed sufficient to establish a legal marriage. *Sneathen v. Sneathen*, 201.

MARRIED WOMEN.

1. MARRIED WOMAN : SEPARATE ESTATE : EXECUTION. The separate property of the wife, as defined under the married woman's act (R. S. 1879, sec. 3296), cannot be subjected to the satisfaction of a judgment against the husband *alone*, although the debt for which it was rendered was created by the husband for necessities for the wife and family. *Bedsworth v. Bowman*, 44.
2. ——— : ———. Neither a married woman's separate estate in equity, nor her statutory separate estate, can be charged without her being made a party to the proceeding to enforce said charge. *Ib.*
3. ——— : ———. The statutory separate estate is a legal one, and was intended to be proceeded against as such for a debt for necessities, the same as if the wife were a *feme sole*. *Ib.*
4. ——— : ———. While no particular or technical words are necessary to create a separate estate in a wife, yet the intent to exclude the husband's common-law rights must clearly appear. *Hart v. Leete*, 315.
5. ——— : ———. A devise of land by a testator to his two daughters "in their own rights" does not create a separate estate. *Ib.*
6. ——— : GIFT OF STOCK OR BONDS : STATUTE. The provision of General Statutes of 1865, chapter 115, section 19, that "any property consisting of stocks and bonds of any kind given by a parent to a daughter shall with the proceeds thereof belong to such daughter, if married, in her own right, and shall not be subject to the payment of the debts of her husband, and may be disposed of by such married daughter the same as if unmarried," applies only where there is a specific gift of the stocks or bonds as such. *Ib.*
7. ——— : ———. Where a testator bequeaths to his daughter one-fifth of his estate and large sums are paid by the executors in distribution to her husband, the fact that such money is derived from dividends and interest on stocks and bonds will not, under said statute, deprive the husband of his marital rights therein. *Ib.*

8. **MARRIED WOMAN'S ACT: PROPERTY PREVIOUSLY REDUCED TO HUSBAND'S POSSESSION.** The act of March 25, 1875 (R. S. 1879, sec. 3296), did not attempt to reinvest the wife with title to property which the husband had reduced to possession, nor was it in the power of the legislature to deprive him of property which had become his own. *Ib.*
9. ——— : **EXISTING MARRIAGES.** Said act of March 25, 1875, secures to the wife her personal property and rights in action, and applies to all cases where the husband had not, at the date of said act, possessed himself of his wife's personal property, no matter when the marriage took place. *Ib.*
10. **MARRIED WOMAN: SETTLEMENT.** Where a wife's funds have become fully vested in the husband, a court will not divest them to make a settlement for her support. *Ib.*
11. ——— : **DEBTS DUE HER: FRAUDULENT CONVEYANCE.** A debt due a wife from a husband stands on the same footing as debts due any other person and he may even give her a preference over the latter, but he cannot convey his property to her in fraud of his creditors. *Ib.*
12. ——— : **SEPARATE ESTATE.** A married woman can deal with her equitable separate estate as a *feme sole*. *Sprague v. Rooney*, 349.
13. ——— : ——— : **SURETYSHIP.** Where the separate estate of a wife is mortgaged to secure her husband's note, her estate stands in the relation of surety to that debt. *Barrett v. Davis*, 549.
14. ——— : ——— : ——— : **EXTENSION OF TIME TO DEBTOR.** A married woman, as to her separate estate, is, in equity, held competent to consent to an extension of a debt for which her estate stands as surety, or to ratify such an extension as indicated below. *Ib.*

MASTER AND SERVANT.

1. **MASTER AND SERVANT: SUPERIOR KNOWLEDGE OF MASTER.** Master and servant do not stand upon an equal footing, even when they have equal knowledge of danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master, and is not entirely free to act upon his own suspicions of danger. *Shortell v. The City of St. Joseph*, 114.
2. ——— : ——— : **NEGLIGENCE OF SERVANT.** If the master orders the servant into a place of danger and the servant is injured, he is not guilty of contributory negligence, unless the danger is so glaring that a reasonably prudent person would not have entered into it. *Ib.*
3. ——— : ——— : ———. If a servant obeys the master's order to go into a place that is so obviously dangerous that a prudent person, though acting in his capacity, would not obey it, he will be guilty of contributory negligence which will defeat a recovery for an injury resulting therefrom. *Ib.*
4. **NEGLIGENCE: FELLOW SERVANTS.** A master is not liable to his servant for damage resulting from the negligence of his fellow servant in the course of their common employment, unless the servant causing the injury is incompetent to discharge his duty, and the master knew of the incompetency. *Higgins v. The Mo. Pac. Ry. Co.*, 413.

5. **RAILROAD : FELLOW SERVANTS.** An engineer and laborer on a railroad construction train are fellow servants where they work under the same conductor, derive their authority and compensation from the same common source, and are engaged in the same general business, though in a different grade of the common service. *Ib.*
6. **MASTER AND SERVANT : ORDINARY RISKS : RAILROAD.** When a railroad company is in the habit of receiving and transporting cars laden with timbers and iron rails projecting over the laden cars, the risk arising therefrom is the ordinary one assumed by a brakeman engaged in the company's service. *Jackson v. The Mo. Pac. Ry. Co.*, 443.
7. — : — : —. Nor is the foregoing rule inapplicable because the company's train dispatcher directed the brakeman to go with a locomotive and tender on a sidetrack on which the dangerous car stood and with which the tender collided, thereby causing the injury, it not appearing what the duties of the train dispatcher were, nor that he knew of the location of the dangerous car on the sidetrack, or of its being laden with projecting rails. *Ib.*

MECHANICS' LIENS.

1. **MECHANIC'S LIEN : PETITION : STATUTE.** A petition to foreclose a subcontractor's lien *held* to sufficiently aver that the account filed with the circuit clerk under Revised Statutes, 1879, section 3176, stated the name of the contractor. *McDermott v. Claas*, 14.
2. — : ACCOUNT : COMPUTATION OF BRICK WORK. A lien claim for furnishing and laying a given number of bricks is sufficient, though it does not state whether the bricks were computed by actual count or by wall measurement, and although it does not separate the value of the bricks from that of the sand and lime used in placing them. *Ib.*
3. — : WALKS AND FENCES. Where walks and fences are constructed under one entire contract for the erection of a building, the mechanic has a lien for labor and materials expended on them. *Ib.*
4. — : NON-REVERSIBLE ERROR. Where in a suit to foreclose a subcontractor's lien, there is no real dispute as to the value of work and materials, the admission in evidence of an acceptance by the owner of the subcontractor's bid is not reversible error. *Ib.*

MERGER.

See DAMAGES, 1, 2, 3.

MONTHLY TENANCY.

See LANDLORD AND TENANT.

MORTGAGES AND DEEDS OF TRUST.

1. **MORTGAGE : FORECLOSURE : EQUITY.** A mortgagor can in this state maintain a bill in equity for the foreclosure of the mortgage. *Wolf v. Ward*, 127.
2. — : — : —. The petition in this case examined and *held* to be a bill in equity to foreclose a mortgage and to state facts sufficient to constitute a good cause of action in equity. *Ib.*

3. **DEED OF TRUST : SALE : TITLE OF PURCHASER.** A sale by a trustee under the power conferred by a deed of trust, whether the sale be valid or invalid, vests in the purchaser the title of the *cestui que trust*. *Ib.*
4. ——— : ———. A sale under the naked power contained in a deed of trust must be made in strict compliance with the terms and conditions prescribed in the deed. *Ib.*
5. ——— : **SALE, CHANGE OF TIME OF : NOTICE.** Where the day of sale of property advertised to be sold under a deed of trust is changed, the notice of sale must be published for the full time required by the terms of the deed of trust, after such change is made. *Ib.*
6. ——— : **FORECLOSURE OF MORTGAGE : PARTIES.** Persons interested in the subject-matter of a suit in equity to foreclose a mortgage may be joined as plaintiffs though their interests are different. *Ib.*
7. ——— : **FORECLOSURE OF MORTGAGE : RECEIVER.** The court in a suit in equity to foreclose a mortgage has the power to appoint a receiver to manage the property, where the defendant is insolvent and the property is insufficient to pay the debt. *Ib.*
8. **MORTGAGE : NOTICE OF SALE.** A mortgagee, whether directed or not by the mortgage, should give notice of sale by him. *Snell v. Harrison*, 158.

MURDER.

See CRIMINAL LAW, 18, 19, 21.

NEGLIGENCE.

1. **MASTER AND SERVANT : SUPERIOR KNOWLEDGE OF MASTER.** Master and servant do not stand upon an equal footing even when they have equal knowledge of danger. The position of the servant is one of subordination and obedience to the master, and he has the right to rely upon the superior knowledge and skill of the master, and is not entirely free to act upon his own suspicions of danger. *Shortel v. The City of St. Joseph*, 114.
2. ——— : ——— : **NEGLIGENCE OF SERVANT.** If the master orders the servant into a place of danger and the servant is injured, he is not guilty of contributory negligence, unless the danger is so glaring that a reasonably prudent person would not have entered into it. *Ib.*
3. ——— : ——— : ———. If a servant obeys the master's order to go into a place that is so obviously dangerous that a prudent person, though acting in his capacity, would not obey it, he will be guilty of contributory negligence which will defeat a recovery for an injury resulting therefrom. *Ib.*
4. **RAILROAD : FOOTWAY : NEGLIGENCE.** A railroad company cannot, because a footway is not a public crossing, negligently and recklessly run its cars over persons who are in the habit of using it as a crossing. *Gurley v. The Mo. Pac. Ry. Co.*, 211.
5. ——— : ——— : ———. If it discovers such person on said crossing, it is its duty to use every precaution to prevent injuring him. *Ib.*

6. **NEGLIGENCE : OPENING BETWEEN CARS : IMPLIED INVITATION.** Where a railroad company was in the habit of making an opening in its trains at a point on its track to enable the public to cross, and a traveler on coming to said crossing found the cars so separated as to induce him and the public to believe that the company intended they should use it for a crossing, and he did so believe, then he was justified in acting on such implied invitation, and the company owed the duty, under the circumstances, of giving him some reasonable or suitable warning of its intention to close the opening, and would be liable if it neglected to do so, and because of such neglect he was injured while passing through. *Ib.*
7. ——— : ——— : ———. Where, however, the railroad, in such case had placed its cars in such close proximity that it was dangerous or hazardous for anyone to pass between them, and it would appear to a reasonably prudent man that the company did not intend the public should use said opening as a crossing, then the implied invitation to pass was revoked, and a traveler is not justified in risking himself between the cars. *Ib.*
8. **ACTIONABLE NEGLIGENCE, WHAT CONSTITUTES.** Actionable negligence consists in the breach, or non-performance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby. *Roddy v. The Mo. Pac. Ry. Co.*, 234.
9. ——— : **CONTRACT : THIRD PERSON.** A third person cannot maintain an action for injuries resulting from a breach of contract arising purely out of the terms of the agreement between the contracting parties. *Ib.*
10. **NEGLIGENCE : BREACH OF CONTRACT : INJURY TO THIRD PERSON.** Although the contract, under which a railway company furnishes to a quarry owner, on his own sidetrack, cars for the transportation of stone, requires it to see that the cars are provided with proper brakes, it is not liable to a servant of such quarry owner who is not a party to the contract, and over whom it has no control, for injuries resulting from the company's breach of its contract with the quarry owner. *Ib.*
11. ——— : ——— : **LIABILITY TO THIRD PERSONS.** Such contract, however, being for the mutual benefit of the quarry owner and the railroad company, the latter in furnishing the cars, which was a matter devolving exclusively on it, was bound to use ordinary care to furnish such as were reasonably safe for the quarry owner and his servants. *Ib.*
12. ——— : **INDEPENDENT CONTRACTOR.** An employer is not responsible for the negligence of a contractor or his servants where such contractor is given entire freedom in the use of means to accomplish the result. *Ib.*
13. ——— : ———. Where the employer, however, reserves the right to direct the manner of performance in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and his employes the exercise of care in that regard. *Ib.*
14. ———. A car with defective brakes is not such an imminently dangerous instrument as to render the railroad company liable to one injured thereby in the absence of any contractual or other relationship. *Ib.*

15. ——— : QUESTION FOR JURY. Where on the issue of contributory negligence fair-minded and sensible men may differ in their conclusions, the question is one for the jury, and this is true although there is no dispute as to the facts. *Ib.*
16. CONTRIBUTORY NEGLIGENCE : DEFECTIVE CAR. Where one to whom a railroad company owes the exercise of due care is furnished with a car having a defective brake and is injured thereby, he cannot recover for such injury, if he knew that defective and dangerous cars were frequently left by the company for his use and could have ascertained by reasonable care on his part the defect in the car causing the injury. *Ib.*
17. ——— : QUESTION FOR JURY. Whether the plaintiff was guilty of contributory negligence in not exercising reasonable care to ascertain the condition of the car was a question for the jury. *Ib.*
18. NEGLIGENCE : RAILROAD : RINGING BELL : ORDINANCE. The failure to ring a bell on a moving railroad engine as required by a city ordinance constitutes negligence. *Hanlon v. The Mo. Pac. Ry. Co.*, 381.
19. ——— : ——— : ——— : ———. Such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury sued for but not otherwise. *Ib.*
20. ——— : RINGING BELL : QUESTION FOR JURY. Whether or not the bell was being rung at the time of the accident is, where the evidence is conflicting, a question for the jury. *Ib.*
21. ——— : PREVENTION OF INJURY : QUESTION FOR JURY. Whether the injury might have been prevented had the bell been rung was also a question for the jury. *Ib.*
22. ——— : HIGHWAY : RAILROAD AND TRAVELER. A traveler and a railroad company when using a public highway in common must each look out for the presence of the other ; one to avoid being injured, and the other to avoid inflicting injury. *Ib.*
23. RAILROAD : TRAVELER : RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE. While such traveler riding on a wagon on the track is guilty of negligence in not looking back for a colliding train, still his negligence will not prevent recovery on his part if the servants of the company in charge of the train saw, or, by the use of proper care, might have seen, the peril to which the traveler was exposed, and thereafter could have avoided the injury and failed to do so. *Ib.*
24. NEGLIGENCE : PLEADING : EVIDENCE. The charge in the petition of negligent management of the train will authorize proof of negligence of the company after its employees saw the peril to which plaintiff was exposed. *Ib.*
25. ——— : INJURY CAUSING DISEASE : QUESTION FOR JURY. Where, in an action for personal injuries caused by the negligence of a railroad, the physician who examined plaintiff after the accident testified that he found evidence of compression of the chest and pneumonia arising from the compression which involved both lungs, and where it appears that the malady from which plaintiff suffered both before and at the trial was superinduced by the pneumonia arising from the injuries, such evidence was sufficient to authorize the finding of the jury that plaintiff's malady was caused by the injuries received in the accident. *Ib.*

26. ——— : FELLOW SERVANTS. A master is not liable to his servant for damage resulting from the negligence of his fellow servant in the course of their common employment, unless the servant causing the injury is incompetent to discharge his duty, and the master knew of the incompetency. *Higgins v. The Mo. Pac. Ry. Co.*, 418.
27. ——— : INSTRUCTION : PROXIMATE CAUSE. An instruction in an action against a railroad for personal injuries, which tells the jury, that if they found the injury was caused by the failure of defendant to station a watchman at the crossing in question, the defendant was liable unless the plaintiff was guilty of negligence, directly contributory to the accident, is not erroneous because it does not require that the absence of the watchman must have been the direct and proximate cause of the accident. *Dickson v. The Mo. Pac. Ry. Co.*, 491.
28. ——— : CITY ORDINANCE : WATCHMAN. The object of a city ordinance, in requiring railroads to station a watchman at street crossings used by them, is to prevent travelers from going on the crossing when trains are approaching, and not to give warning of danger when it is too late to avoid it. *Ib.*
29. ——— : RINGING BELL : QUESTION FOR JURY.. Whether a bell of a locomotive was ringing is, in a case of conflicting evidence, a question for the jury, and the supreme court will not disturb its finding thereon, even where it appears to be against the weight of the evidence. *Ib.*
30. ——— : ALLEGATIONS AND PROOF. Evidence that the company's servants in charge of the train discovered plaintiff's peril in time to have averted the injury is admissible under the averments of the petition, that the defendant's agents negligently moved and managed the train by which the injury was occasioned. *Ib.*
31. ——— : SURROUNDING CIRCUMSTANCES. Whether or not a person's acts constitute negligence must be determined in view of the surrounding circumstances. *Ib.*
32. CONTRIBUTORY NEGLIGENCE. The question of contributory negligence in this case held to be one for the jury. *Ib.*
33. NEGLIGENCE : DRIVER OF VEHICLE : INJURY. The negligence of the driver of a vehicle, he not being in the employment or under the control of the person injured while riding thereon, cannot be imputed to the latter. *Ib.*
34. ——— : DEATH : EXTRA TERRITORIAL FORCE OF STATUTE. A resident of Missouri was killed in Kansas by the negligent acts of a railroad company, in whose service he was engaged, under such circumstances as would have entitled his widow to recover under the second section of our damage act, if the accident had occurred in Missouri. The Kansas statute provides that "when the death of one is caused by the wrongful act or omission of another the personal representatives of the former may maintain an action therefor. * * * The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Held that the widow could not recover in an action in Missouri though no administrator could be appointed in Kansas, because the deceased left no estate there, and though the action could be brought in either state by an administrator appointed in Missouri. *Oates v. The Union Pac. Ry. Co.*, 514.

85. **RAILROAD: NEGLIGENCE: PETITION.** A petition in an action against a railroad for the death of a person by its negligence is sufficient which avers in substance that the defendant by its servants, while running a locomotive and train of cars over its road, did so carelessly and negligently manage and conduct the same that it ran against, struck and fatally injured the deceased. *Shaw v. The Mo. Pac. Ry. Co.*, 648.
86. ——— : ——— : **TRESPASSER ON TRACK.** The servants of a railroad company owe to a trespasser on its trestle only the duty so soon as he is discovered on the track of promptly using all efforts within their power, consistent with the safety of the train and of those upon it, to avoid injuring him. *Ib.*
87. **THE EVIDENCE** in this case examined and the action of the trial court in sustaining a demurrer to plaintiff's evidence sustained. *Ib.*

NEGOTIABLE INSTRUMENTS.

See **BILLS AND NOTES**, 2.

NEW TRIAL.

See **PRACTICE, CRIMINAL**, 12.

NOTICE.

NOTICE: FACTS PUTTING ONE ON INQUIRY. Facts and circumstances which would naturally put a person of ordinary caution on an inquiry, reasonably leading to knowledge of the truth, are evidence from which that knowledge may be found. *Burrett v. Davis*, 549.

See **TAX SALES**, 4, 5, 6.

WILLS.

OFFICES AND OFFICERS.

1. **OFFICE, RESIGNATION OF.** An officer has the right to resign his office. *The State ex rel. Sanders v. Blakemore*, 840.
2. **CLERK OF COURT: SUSPENSION: RESIGNATION: APPOINTMENT BY GOVERNOR.** Revised Statutes of 1879, section 630, provide that a court may suspend its clerk for misdemeanor in office until a trial can be had, and may appoint a temporary clerk, who "shall continue in office until the regular clerk shall resume his office or a successor shall be elected." Section 615 provides that when any vacancy shall occur in the office of any clerk of a court of record by death, resignation, removal or otherwise, the governor shall appoint some eligible person, who shall discharge the duties of the office until the next general election, at which time a clerk shall be chosen for the remainder of the term. *Held*, that after the appointment of a temporary clerk by the court the resignation of the suspended clerk did not create a vacancy to be filled by the governor. *Ib.*
3. **TAX SALES: NOTICE: CITY CHARTER.** Where a city charter requires the collector to post written notices of tax sales, he may do so by his deputy. *Lynch v. Donnell*, 519.
4. **MANDAMUS: OFFICER.** The remedy by *mandamus* is allowable against a public officer only in case the person seeking its benefit is directly interested in the performance of the matter demanded, and has no other adequate, specific and effective remedy at law. *The State ex rel. Clark v. Smith*, 661.

5. ——— : ———. Where a pending election contest affords one a sufficiently plain and specific remedy to have his right to an office determined, he cannot resort to *mandamus*. *Ib.*

OFFICIAL BONDS.

OFFICIAL BOND : ERASURE OF NAME OF SURETY : SPOILIATION. The mutilation of the official bond of a county officer by the fraudulent erasure of a name of a surety, after the bond had been signed, delivered and approved by the county court, will constitute no defense to a suit on the bond, since the erasure could not be made by the county, and if made by the surety himself, some county officer, or any third person, it would be only spoliation and would not affect the validity of the bond nor relieve the principal or any surety from liability thereon. *The State ex rel. Pemiscot Co. v. Scott*, 26.

PART PERFORMANCE.

1. CONTRACT : PART PERFORMANCE : EVIDENCE. The acts relied on to show part performance of a contract to convey land, to take it out of the statute of frauds, should be clear and definite and be referable exclusively to the contract, and the latter must be established by competent evidence to be clear, definite and unequivocal in all its terms. *Rogers v. Wolfe*, 1.
2. ——— : ——— : ———. The evidence in this case reviewed and held not to meet the requirements of the foregoing rule. *Ib.*

PARTIES.

1. SPECIFIC PERFORMANCE : PARTIES. The infant heirs of one charged to have agreed to convey land are necessary parties to an answer in ejectment setting up such contract and asking specific performance. *Rogers v. Wolfe*, 1.
2. PRACTICE : INFANTS : NEXT FRIEND. The trial court should appoint a next friend to protect the interests of such infants, and it is error not to do so. *Ib.*
3. ——— : FORECLOSURE OF MORTGAGE : PARTIES. Persons interested in the subject-matter of a suit in equity to foreclose a mortgage may be joined as plaintiffs though their interests are different. *Wolff v. Ward*, 127.
4. PARTIES : CONTRACT FOR BENEFIT OF THIRD PERSON. A person for whose benefit an express promise is made in a valid contract between others may in this state maintain an action thereon in his own name. *Ellis v. Harrison*, 270.
5. ——— : ———. The beneficiary of such a contract does not acquire a better standing to enforce it than that of a contracting party. *Ib.*
6. ——— : CAUSE OF ACTION : STATUTE. Where a statute gives the cause of action and designates the persons who may sue, they alone can sue and must do so within the time prescribed by statute. *Oates v. The Union Pac. Ry. Co.*, 514.

PARTNERSHIP.

1. PARTNERSHIP AGREEMENT : PAROL EVIDENCE. Where partnership articles provided that a firm should assume the "mercantile debts" of the then jobbing business of one of the partners, oral evidence was admissible of contemporaneous acts and declarations of the parties and of the opening entries in their firm books to prove the sense in which those terms were used. *Ellis v. Harrison*, 270.

2. **NOTE: BUSINESS UNDER FIRM-NAME: PREFERENCE.** Where one does business under a firm-name, he owning all the property, the debts are individual ones, and no preference exists among his creditors. *The Bremen Sav. Bank v. The Branch-Crookes Saw Co.*, 425.
3. ———: ———. Where one doing business in his individual name, and also under a firm-name, borrows money on the credit of both, and afterwards organizes a corporation and transfers all his assets to it, the inference is strong that the corporation assumed the debt. *Ib.*
4. **PARTNERSHIP, PAYMENT OF SALARY DOES NOT CONSTITUTE.** Where a person enters into a contract with another by which the latter is to receive as his salary a certain sum of money and five per cent. of the profits of the business, while the former is to own the entire capital stock, no partnership is created. *Ib.*

PAYMENT.

See SALE, 1, 2.

PETITION FOR REVIEW.

See PRACTICE, CIVIL, 6.

PLEADING.

1. **MECHANIC'S LIEN: PETITION: STATUTE.** A petition to foreclose a subcontractor's lien *held* to sufficiently aver that the account filed with the circuit clerk under Revised Statutes, 1879, section 3176, stated the name of the contractor. *McDermott v. Clgas*, 14.
2. ———: ACCOUNT: COMPUTATION OF BRICK WORK. A lien claim for furnishing and laying a given number of bricks is sufficient, though it does not state whether the bricks were computed by actual count or by wall measurement, and although it does not separate the value of the bricks from that of the sand and lime used in placing them. *Ib.*
3. **PRACTICE: CAPTION OF AMENDED PETITION: OMISSION OF NAME.** The omission of the name of a party defendant from the caption of an amended petition is not material where such name appears in the body of the petition. *Wolff v. Ward*, 127.
4. **RAILROAD: NEGLIGENCE: PETITION.** A petition in an action against a railroad for the death of a person by its negligence is sufficient which avers in substance that the defendant by its servants while running a locomotive and train of cars over its road, did so carelessly and negligently manage and conduct the same that it ran against, struck and fatally injured the deceased. *Shaw v. The Mo. Pac. Ry. Co.*, 648.

PLEADING, CRIMINAL.

1. **CRIMINAL LAW: INDICTMENT: ROBBERY IN FIRST DEGREE.** It is not necessary to allege, in an indictment for robbery in the first degree, that the putting in fear was done feloniously. *State v. Brown*, 365.
2. ———: MURDER: INDICTMENT. The averment in an indictment for murder that the fatal blow was given on a specified day, and that the deceased languished one hour and then died, sufficiently charges the date of the death. *State v. Luke*, 563.

3. ——— : ——— : ———. The indictment in this case *held* to sufficiently charge, that the death of the deceased resulted from the effects of the blow inflicted by the defendant. *Ib.*

POSSESSION.

1. SALE : PAYMENT OF PURCHASE PRICE : DELIVERY OF POSSESSION. On a sale of mules the vendor receiving a small sum of money at the time and a draft for the balance of the purchase price on certain commission merchants to whom he consigned the animals, to be by them delivered to the vendee on payment of the draft and not before, the possession would remain in the vendor and his agents until the purchase price was paid. *Bergman v. The Indianapolis & St. L. Ry. Co., 77.*
2. ——— : ——— : ———. The retention of the bill of lading by the vendee and the forwarding of the same with the draft to the consignees, of themselves, sufficiently indicated the intention of the vendor to retain the possession and control of the mules until payment of the draft. *Ib.*
3. ——— : FRAUD : RESCISSION BY VENDOR : RIGHT OF STOPPAGE IN TRANSITU. A vendor who by the contract of sale is to keep the possession of the property sold, until the purchase price is paid, has the right, where the vendee gets possession by improper means, making it tortious, to retake the property and place himself in the position where the contract left him, and this he may do without restoring to the vendee a part of the purchase price paid at the time of the sale. *Ib.*
4. ——— : ——— : ——— : ——— : STATUTE. Section 2505, Revised Statutes, 1879, has no application to a case where a vendee fraudulently obtains possession of personal property sold before payment of the purchase price and sells it to a third party to whom it is consigned, and the original vendor exercises his right of stoppage *in transitu*, where the contest is between the last purchaser and the carrier for the value of the property which it failed to deliver. *Ib.*
5. ——— : DELIVERY : STATUTE. The latter clause of section 2505, Revised Statutes, 1879, has no application to a sale of personal property where possession was never given to the vendee. *Ib.*

PRACTICE, CIVIL.

1. ERROR : WAIVER. A party not appealing cannot complain of error. *Rogers v. Wolfe, 1.*
2. SPECIFIC PERFORMANCE : PARTIES. The infant heirs of one charged to have agreed to convey land are necessary parties to an answer in ejectment setting up such contract and asking specific performance. *Ib.*
3. PRACTICE : INFANTS : NEXT FRIEND. The trial court should appoint a next friend to protect the interests of such infants, and it is error not to do so. *Ib.*
4. ——— : PETITION. Where a petition states a cause of action, though imperfectly or indefinitely, a general objection to the introduction of evidence at the trial, because it fails to state a cause of action, should be overruled. *McDermott v. Claas, 14.*

5. ———: HARMLESS ERROR. The supreme court will not reverse a judgment on a merely technical ground not affecting the merits of the cause, because, *e. g.*, the petition failed to aver a fact which the evidence showed to be undisputed. *Ib.*
6. PETITION FOR REVIEW: APPEARANCE. A petition for review of a judgment, under the act of 1883, amending section 3684, Revised Statutes, 1879 (Laws, 1833, p. 125), providing for such review where a defendant has not been summoned as required by law or shall not have appeared to the suit, will not lie where the record shows that the defendant did appear to the suit. *The State ex rel. Pemiscot Co. v. Scott*, 26.
7. PRACTICE: INSTRUCTIONS. Where a cause has been fairly submitted to the jury under instructions given by the court, nothing more should be required, and the appellate court will not critically examine instructions refused in order to discover one that might appropriately have been given. *Bergeman v. The Indianapolis & St. L. Ry. Co.*, 77.
8. ———: ———. Instructions embodying abstract propositions of law correct in themselves should not be given when not predicated upon the evidence in the particular case to be determined. *Ib.*
9. ———: DISQUALIFICATION OF WITNESS: WAIVER. Where a party to a suit is disqualified to testify, the taking of his deposition by the adverse party constitutes a waiver of his incompetency; but, if such waiver is relied upon as entitling him to testify, it should so be suggested to the trial court. *Tomlinson v. Ellison*, 103.
10. ———: INSTRUCTIONS. Instructions which taken as a whole properly present the law of the case to the jury are not objectionable. *Shortel v. The City of St. Joseph*, 114.
11. ———: ———: CLERICAL ERROR. Clerical errors in an instruction, which are readily discovered upon a reading of it, will not constitute reversible error. *Ib.*
12. ———: CHANGE OF VENUE: RECORD PROPER: EXCEPTIONS. Applications for changes of venue are not a part of the record proper, and the ruling of the trial court thereon will not be reviewed, unless exceptions are saved and the matter is brought to the attention of the trial court in the motion for a new trial. *Wolff v. Ward*, 127.
13. ———: APPOINTMENT OF RECEIVER. A like rule is applicable to the action of the court in the appointment of a receiver. *Ib.*
14. ———: CHANGE OF VENUE. Whether or not an application for a change of venue asked eight or ten days after knowledge of the cause thereof came to the appellant is timely made, rests largely in the discretion of the trial judge. *Ib.*
15. ———: ———. An application for a change of venue because of the prejudice of the inhabitants of the county is properly overruled where the case is one in equity, triable by the court. *Ib.*
16. ———: DEMURRER. A defendant who stands on his overruled demurrer and appeals is as much bound by the admissions of the demurrer, in the appellate court, as he was in the trial court. *Ib.*
17. ———: FORECLOSURE OF MORTGAGE: PARTIES. Persons interested in the subject-matter of a suit in equity to foreclose a mortgage may be joined as plaintiffs though their interests are different. *Ib.*

18. ——— : CAPTION OF AMENDED PETITION : OMISSION OF NAME. The omission of the name of a party defendant from the caption of an amended petition is not material where such name appears in the body of the petition. *Ib.*
19. ——— : FORECLOSURE OF MORTGAGE : RECEIVER. The court in a suit in equity to foreclose a mortgage has the power to appoint a receiver to manage the property, where the defendant is insolvent and the property is insufficient to pay the debt. *Ib.*
20. ——— : NONSUIT. While a plaintiff under our practice may take a nonsuit, a defendant cannot so as to prevent a part of the matter in litigation from being adjudicated. *Snell v. Harrison*, 158.
21. BILL OF EXCEPTIONS : SEAL : JOINDER IN ERROR : WAIVER. A bill of exceptions need not be sealed, and if so required an objection for that reason after joinder in error comes too late. *Ib.*
22. EVIDENCE : INCREDIBLE STATEMENT. A statement in evidence may be so contradictory of general knowledge that no court is bound to believe it. *Gurley v. The Mo. Pac. Ry. Co.*, 211.
23. PRACTICE : QUESTION FOR JURY. Where on the issue of contributory negligence fair-minded and sensible men may differ in their conclusions, the question is one for the jury, and this is true although there is no dispute as to the facts. *Roddy v. The Mo. Pac. Ry. Co.*, 234.
24. CONTRIBUTORY NEGLIGENCE : DEFECTIVE CAR. Where one to whom a railroad company owes the exercise of due care is furnished with a car having a defective brake and is injured thereby, he cannot recover for such injury, if he knew that defective and dangerous cars were frequently left by the company for his use and could have ascertained by reasonable care on his part the defect in the car causing the injury." *Ib.*
25. ——— : QUESTION FOR JURY. Whether the plaintiff was guilty of contributory negligence in not exercising reasonable care to ascertain the condition of the car was a question for the jury. *Ib.*
26. PRACTICE : ISSUE OF FACT OR LAW : WAIVER. When a party by instructions has submitted an issue to the trial court as one of fact, he cannot, on appeal, maintain that it should have been treated as an issue of law. *Ellis v. Harrison*, 270.
27. ——— : INSTRUCTIONS. Instructions should be complete in themselves and not remit the jury to the pleadings to ascertain their scope or meaning. *The Chicago, S. F. & C. Ry. Co. v. McGrew*, 282.
28. CONTRACT : PAROL EVIDENCE : ILLEGAL CONSIDERATION. A contract, under seal, in the form of one for sale of land may, in a suit for specific performance, be shown by parol evidence to be in fact a lease made in violation of the statute, against letting premises for bawdy-house purposes. (*Overruling Sprague v. Rooney*, 82 Mo. 493.) *Sprague v. Rooney*, 849.
29. ——— : ——— : PLEADING. Such parol evidence was admissible under the general denial of the answer. *Ib.*
30. NEGLIGENCE : RINGING BELL : QUESTION FOR JURY. Whether or not the bell of a locomotive was being rung at the time of the accident is, where the evidence is conflicting, a question for the jury. *Hanlon v. The Mo. Pac. Ry. Co.*, 381.

81. ——— : PREVENTION OF INJURY: QUESTION FOR JURY. Whether the injury might have been prevented had the bell been rung was also a question for the jury. *Ib.*
82. ——— : PLEADING: EVIDENCE. The charge in the petition of negligent management of the train will authorize proof of negligence of the company after its employes saw the peril to which plaintiff was exposed. *Ib.*
33. ——— : INJURY CAUSING DISEASE: QUESTION FOR JURY. Where in an action for personal injuries caused by the negligence of a railroad, the physician who examined plaintiff after the accident testified that he found evidence of compression of the chest and pneumonia arising from the compression which involved both lungs, and where it appears that the malady from which plaintiff suffered both before and at the trial was superinduced by the pneumonia arising from the injuries, such evidence was sufficient to authorize the finding of the jury that plaintiff's malady was caused by the injuries received in the accident. *Ib.*
34. PRACTICE: CONTINUANCE. It was not error for the trial court to refuse a continuance because of the absence of a witness, where no diligence was used to procure his evidence at the trial. *Irwin v. Woodmansee*, 403.
35. ——— : COURT OF APPEALS: WRIT OF ERROR. Where a court of appeals has jurisdiction of the subject-matter of an action, the question whether the writ of error therein was issued within the statutory period is one peculiarly for that court to decide, and its ruling thereon is not reviewable by prohibition. *The State ex rel. Scott v. Smith*, 419.
36. ——— : WRIT OF ERROR: TIME OF TAKING. The date when the motion for a new trial is overruled is to be taken as the starting date in computing the time within which a writ of error may issue, in an action for divorce, under Revised Statutes, 1889, section 4510. *Ib.*
37. JUDGMENT, FINALITY OF: MOTION FOR NEW TRIAL. A judgment is not considered a finality for the purposes of review during the pendency of a motion for a new trial. *Ib.*
38. PRACTICE: INSTRUCTION: ASSUMPTION OF FACT. The assumption in an instruction of a fact of which there is some proof and no controverting evidence will not constitute reversible error. *Dickson v. The Mo. Pac. Ry. Co.*, 491.
39. RINGING BELL: QUESTION FOR JURY. Whether a bell of a locomotive was ringing is, in a case of conflicting evidence, a question for the jury, and the supreme court will not disturb its finding thereon, even where it appears to be against the weight of the evidence. *Ib.*
40. ——— : ALLEGATIONS AND PROOF. Evidence that the company's servants in charge of the train discovered plaintiff's peril in time to have averted the injury is admissible under the averments of the petition, that the defendant's agents negligently moved and managed the train by which the injury was occasioned. *Ib.*
41. PARTIES: CAUSE OF ACTION: STATUTE. Where a statute gives the cause of action and designates the persons who may sue, they alone can sue and must do so within the time prescribed by statute. *Oates v. The Union Pac. Ry. Co.*, 514.

42. PRACTICE : INSTRUCTIONS. Instructions are properly refused when they do not conform to the pleadings and evidence in the case. *Sparks v. The Dispatch Trans. Co.*, 531.
43. ——— : AMENDMENT : NON-REVERSIBLE ERROR. It is not a ground of reversal of a judgment that the trial court permitted an amendment of a petition by interlineation, even where such amendment is the averment of an additional demand against the defendant. *The South Joplin Land Co. v. Case*, 572.
44. PROHIBITION : PRELIMINARY ORDER IN VACATION : SUPREME COURT. A judge of the supreme court may in vacation issue a preliminary order returnable into court to show cause why a writ of prohibition should not be issued. *The State ex rel. Macklin v. Rombauer*, 619.
45. PRACTICE : AMENDED PETITION : DEPARTURE : WAIVER. Where a defendant files an answer to an amended petition changing the cause of action from the original one, and goes to trial on the merits, he cannot, after a new trial has been awarded, object to another amended petition on the ground of its being a departure from the original one. *Spurlock v. The Mo. Pac. Ry. Co.*, 658.
46. CONTESTED ELECTION CASE : NOTICE. The notice of contest initiates the proceeding in a contested election case. *State ex rel. Clark v. Smith*, 661.
47. MANDAMUS : PRACTICE. A motion for a peremptory writ of *mandamus*, notwithstanding the return of respondent, operates as a demurrer to such return. *Ib.*

PRACTICE, CRIMINAL

1. CRIMINAL PRACTICE : INSTRUCTIONS : ROBBERY. It is error for the court to omit the element of felonious intent in its instructions on robbery in the first degree. *State v. Brown*, 365.
2. ——— : ——— : ——— : FELONIOUSLY. It is not necessary to use the word "felonious" in the instructions, but, if used, its meaning should be defined. *Ib.*
3. ——— : DEFENDANT'S TESTIMONY : INSTRUCTIONS. Defendants in a criminal case are entitled to have the question of their guilt or innocence submitted to the jury on the facts as testified to by them. *Ib.*
4. ——— : INSTRUCTION ON DEFENDANT'S EVIDENCE. An instruction is proper which tells the jury that in determining what weight should be given the defendants' testimony, they *should* consider the fact that they are the defendants. (*State v. Cook*, 84 Mo. 40, and *State v. Young*, 99 Mo. 666, *affirmed.*) *Ib.*
5. ——— : ———. An instruction in a criminal case is proper which tells the jury that the law presumes what defendants said against themselves to be true, but that the jury might believe or disbelieve what they said for themselves. *Ib.*
6. ——— : REOPENING CASE : JUDICIAL DISCRETION. The refusal of the trial court to reopen the case to permit a defendant to offer additional evidence will not afford a ground for reversal, where it does not appear that the discretion of the court was unfairly or unsoundly exercised. *State v. Shroyer*, 441. .

7. ——— : INSTRUCTIONS : ALIBI. The general instruction given to the jury in this case that if they had reasonable doubt of defendant's guilt they should acquit him *held* to have sufficiently embraced the law arising on the effect of the evidence offered tending to prove an *alibi*. *Ib.*
8. ——— : POSTPONEMENT OF TRIAL : EXCEPTIONS. The refusal of the trial court to postpone the further trial of the cause until the next day to enable the defendants to procure the attendance of an absent witness, will not be reviewed in the absence of exceptions duly saved. *State v. Luke*, 563.
9. CRIMINAL LAW : HOMICIDE : INSTRUCTIONS. The evidence in this case *held* to have authorized the court to instruct on murder in the second degree and on manslaughter in the second, third and fourth degrees. *Ib.*
10. CRIMINAL PRACTICE : INSTRUCTIONS. It is not error for the court to refuse instructions embodying the same principle as those already given. *Ib.*
11. ——— : ———. Where the instructions asked in a criminal case may confuse the jury, it is the duty of the court to give in lieu of them an appropriate one on the issue of facts involved. *Ib.*
12. ——— : NEW TRIAL : NEWLY-DISCOVERED EVIDENCE. Where on an application for a new trial because of newly-discovered evidence its materiality, or the effort which had been made to discover it in time for the trial, does not appear, the new trial is properly denied. *Ib.*
13. ——— : VARIANCE : EXCEPTIONS. Under Revised Statutes, 1879, section 1820, the objection of variance between the charge in the indictment and proof of the description of anything named therein must be specially raised in the trial court, and exceptions thereto duly saved. *State v. Ballard*, 634.
14. ——— : FAILURE OF PROOF. Where, however, the evidence shows a total failure of proof of defendant's guilt, the supreme court will review the same, although the attention of the trial court was not specially called thereto. *Ib.*
15. ——— : DEFENDANT AS WITNESS : INSTRUCTION. Where on a trial for murder defendant has testified in his own behalf, it is not error to instruct the jury that they *should* consider the fact in weighing the evidence, that defendant is the prisoner on trial. *State v. Morrison*, 638.
16. CRIMINAL LAW : SEDUCTION UNDER PROMISE OF MARRIAGE : CORROBORATING EVIDENCE. On a trial of an indictment for the seduction of a woman under promise of marriage, she must, under Revised Statutes, 1879, section 1912, be corroborated as to the promise by other evidence than that given by herself. *State v. McCaskey*, 644.
17. ——— : ——— : GOOD REPUTE. The duty is on the state in such case to allege and prove that she was a woman of good repute. *Ib.*
18. CRIMINAL PRACTICE : INSTRUCTIONS. Instructions should not refer the jury to the indictment to determine what they must find in order to convict. *Ib.*

PRACTICE IN SUPREME COURT.

1. **PRACTICE : HARMLESS ERROR.** The supreme court will not reverse a judgment on a merely technical ground not affecting the merits of the cause, because, *e. g.*, the petition failed to aver a fact which the evidence showed to be undisputed. *McDermott v. Claas*, 14.
2. ——— : **NON-REVERSIBLE ERROR.** Where in a suit to foreclose a subcontractor's lien, there is no real dispute as to the value of work and materials, the admission in evidence of an acceptance by the owner of the subcontractor's bid is not reversible error. *Ib.*
3. ——— : **DEFECTS IN RECORD PROPER.** Defects of a fatal character appearing upon the face of the record proper will be reviewed in the supreme court, even in the absence of a motion for a new trial or in arrest of judgment. *The State ex rel. Pemiscot Co. v. Scott*, 26.
4. **PRACTICE IN SUPREME COURT : ESTOPPEL.** Parties in the appellate court are bound by the positions assumed by them in the trial court. *Tomlinson v. Ellison*, 103.
5. **PRACTICE : DEMURRER.** A defendant who stands on his overruled demurrer and appeals is as much bound by the admissions of the demurrer, in the appellate court, as he was in the trial court. *Wolff v. Ward*, 127.
6. **VERDICT : EXCESSIVE DAMAGES, PRACTICE IN SUPREME COURT AS TO.** The supreme court will not, because the damages awarded by the verdict of a jury are excessive, indicate a sum to be remitted so that on such *remittitur* being entered judgment may be affirmed as to the residue. *Gurley v. The Mo. Pac. Ry. Co.*, 211.
7. ——— : ———. Such excessive verdict will not be disturbed by the supreme court, unless, on its face, it appears to be the result of passion or prejudice, and where it does so appear to be the result of passion or prejudice it will be set aside entirely. *Ib.*
8. **ASSAULT WITH INTENT TO KILL : REVIEW OF CONVICTION.** Where there is no error in the instructions and the verdict is supported by the evidence a conviction of an assault with intent to kill will be affirmed. *State v. Baker*, 269.
9. **NEGLIGENCE : PERSONAL INJURIES : DAMAGES : VERDICT.** The question of the amount of the verdict is peculiarly one for the jury, and the supreme court will not interfere with it on the ground of excessiveness, unless it clearly appears that such verdict was the result of improper motives or conduct on the part of the jury. *Hanlon v. The Mo. Pac. Ry. Co.*, 381.
10. **PRACTICE IN SUPREME COURT : FINDING OF FACTS.** The finding of facts by a court in an action at law stands upon the same footing as the verdict of a jury, and will not be disturbed by the supreme court if there is substantial evidence to support it. *Irwin v. Woodmansee*, 403.
11. ——— : **REVIEWING FINDING IN EQUITY CASE.** Where the finding of the trial court in an equity case is clearly erroneous, the supreme court will not defer to it. *Fulkerson v. Sappington*, 472.
12. ——— : ———. In an equity case the supreme court will review the facts as well as the law. *Felton v. Gregory*, 483.

13. ——— : AGENCY. The court finds that the evidence does not establish the authority of a certain firm of real-estate dealers to act for defendant in the making of a contract for the sale of land as the firm assumed to do. *Ib.*
14. PRACTICE IN SUPREME COURT IN EQUITY CASES : ERRONEOUS EVIDENCE. In suits in equity the supreme court, on appeal, may discard evidence erroneously admitted in the trial court, without remanding for a new trial. *Barrett v. Davis*, 549.
15. CRIMINAL PRACTICE : POSTPONEMENT OF TRIAL : EXCEPTIONS. The refusal of the trial court to postpone the further trial of the cause until the next day to enable the defendant to procure the attendance of an absent witness, will not be reviewed in the absence of exceptions duly saved. *State v. Luke*, 563.
16. PRACTICE : AMENDMENT : NON-REVERSIBLE ERROR. It is not a ground of reversal of a judgment that the trial court permitted an amendment of a petition by interlineation, even where such amendment is the averment of an additional demand against the defendant. *The South Joplin Land Co. v. Case*, 572.
17. ——— : FAILURE OF PROOF. Where the evidence shows a total failure of proof of defendant's guilt, the supreme court will review the same, although the attention of the trial court was not specially called thereto. *State v. Ballard*, 684.

PREFERENCE.

See PARTNERSHIP, 2.

PRESUMPTION.

DEED, DELIVERY OF : ACCEPTANCE : INFANT GRANTEES : PRESUMPTION OF. When the grantees are infants the law presumes assent on their part to a beneficial conveyance, and knowledge of the same and its delivery are not essential. *Sneathen v. Sneathen*, 201.

PRINCIPAL AND AGENT.

1. SALE : PRINCIPAL AND AGENT : EVIDENCE. The acts, declarations and admissions of an agent in reference to the business of the principal with which he has been intrusted, if made while engaged in its execution, or so soon thereafter as to constitute a part of the transaction, will bind the principal, and are admissible in evidence against him. *Bergeman v. The Indianapolis & St. L. Ry. Co.*, 77.
2. ——— : ——— : ———. When the acts of the agent will bind the principal, his declarations respecting the subject-matter will also bind him, if made at the time. *Ib.*
3. ——— : PRINCIPAL AND AGENT : FRAUD : EVIDENCE. Evidence that an agent, who bought property from one who had fraudulently obtained possession of it under a contract of purchase, was an old acquaintance of his vendor, that the conduct of the sale was unusual, that the payment by the agent was not according to the usual custom, that when charged with knowledge of the fraud he made no denial, and that, although present at the trial, he was not called as a witness, will justify the submission to the jury of the question, whether the agent knew of the fraud. *Ib.*
4. ——— : ——— : ——— : NOTICE. Where the only right a vendor has to the possession of the property sold is a statement fraudulently obtained, knowledge by the agent of the buyer that this statement was false, will prevent his principal from being an innocent purchaser. *Ib.*

5. **PRACTICE IN SUPREME COURT : AGENCY.** The court finds that the evidence does not establish the authority of a certain firm of real-estate dealers to act for defendant in the making of a contract for the sale of land as the firm assumed to do. *Felton v. Gregory*, 488.
6. **PRINCIPAL AND AGENTS : ACQUIESCENCE IN ACTS OF AGENT.** A principal's long acquiescence (here, four and a half years) in, and enjoyment of the fruits of, a transaction had on her behalf, by an agent with assumed authority, held a ratification of the transaction. *Barrett v. Davis*, 549.

PRINCIPAL AND SURETY.

1. **SURETY : CAUSE OF ACTION.** A surety has no cause of action against his principal, until he has paid the debt or some part of it. *Huse v. Ames*, 91.
2. **MARRIED WOMAN : SEPARATE ESTATE : SURETYSHIP.** Where the separate estate of a wife is mortgaged to secure her husband's note, her estate stands in the relation of surety to that debt. *Barrett v. Davis*, 549.
3. **SURETY : EXTENSION OF TIME TO DEBTOR : RELEASE OF DEBT.** A contract between debtor and creditor for an extension of time of payment for any definite period, without consent of the surety, discharges the latter. *Ib.*
4. ——— : ——— : **CONSENT OF SURETY.** Where such agreement is made upon condition that the surety assents thereto, it does not discharge the latter. *Ib.*
5. ——— : ——— : ———. Such condition may be verbal and collateral to a written agreement. *Ib.*
6. **WRITTEN CONTRACT ; EVIDENCE.** Facts showing that a writing never acquired original vitality as a contract are admissible in evidence. *Ib.*
7. **MARRIED WOMAN : SEPARATE ESTATE : SURETYSHIP : EXTENSION OF TIME TO DEBTOR.** A married woman, as to her separate estate, is, in equity, held competent to consent to an extension of a debt for which her estate stands as surety, or to ratify such an extension as indicated below in this case. *Ib.*

See OFFICIAL BONDS, 1.

PROHIBITION.

1. **JURISDICTION : COURT OF APPEALS : WRIT OF ERROR.** Where a court of appeals has jurisdiction of the subject-matter of an action, the question whether the writ of error therein was issued within the statutory period is one peculiarly for that court to decide, and its ruling thereon is not reviewable by prohibition. *The State ex rel. Scott v. Smith*, 419.
2. **PROHIBITION : PRELIMINARY ORDER IN VACATION : SUPREME COURT.** A judge of the supreme court may in vacation issue a preliminary order returnable into court to show cause why a writ of prohibition should not be issued. *The State ex rel. Macklin v. Rombauer*, 619.

RAILROADS.

1. **RAILROAD : FOOTWAY : PUBLIC CROSSING.** The public use of a foot-way as a crossing over a railroad track, with the acquiescence of the company, does not convert it into a public crossing within the meaning of Revised Statutes, 1889, section 2603. *Gurley v. The Mo. Pac. Ry. Co.*, 211.

2. ———: ———: ———. Nor does such use and acquiescence devolve upon the company the duty of maintaining the footway as a public crossing and of keeping it open and unobstructed, subject to the statutory penalties for failure to do so. *Ib.*
3. ———: ———: NEGLIGENCE. The company cannot, however, because such way is not a public crossing, negligently and recklessly run its cars over persons who are in the habit of using it as a crossing. *Ib.*
4. ———: ———: ———. If it discovers such person on said crossing, it is its duty to use every precaution to prevent injuring him. *Ib.*
5. NEGLIGENCE: OPENING BETWEEN CARS: IMPLIED INVITATION. Where a railroad company was in the habit of making an opening in its trains at a point on its track to enable the public to cross, and a traveler on coming to said crossing found the cars so separated as to induce him and the public to believe that the company intended they should use it for a crossing, and he did so believe, then he was justified in acting on such implied invitation and the company owed the duty, under the circumstances, of giving him some reasonable or suitable warning of its intention to close the opening, and would be liable if it neglected to do so, and because of such neglect he was injured while passing through. *Ib.*
6. ———: ———: ———. Where, however, the railroad, in such case, had placed its cars in such close proximity that it was dangerous or hazardous for anyone to pass between them, and it would appear to a reasonably prudent man that the company did not intend the public should use said opening as a crossing, then the implied invitation to pass was revoked, and a traveler is not justified in risking himself between the cars. *Ib.*
7. ACTIONABLE NEGLIGENCE, WHAT CONSTITUTES. Actionable negligence consists in the breach or non-performance of some duty which the party charged with the negligent act or omission owed to the one suffering loss or damage thereby. *Roddy v. The Mo. Pac. Ry. Co.*, 284.
8. ———: CONTRACT: THIRD PERSON. A third person cannot maintain an action for injuries resulting from a breach of contract arising purely out of the terms of the agreement between the contracting parties. *Ib.*
9. NEGLIGENCE: BREACH OF CONTRACT: INJURY TO THIRD PERSON. Although the contract under which a railway company furnishes to a quarry owner, on his own sidetrack, cars for the transportation of stone, requires it to see that the cars are provided with proper brakes, it is not liable to a servant of such quarry owner who is not a party to the contract and over whom it has no control, for injuries resulting from the company's breach of its contract with the quarry owner. *Ib.*
10. ———: ———: LIABILITY TO THIRD PERSONS. Such contract, however, being for the mutual benefit of the quarry owner and the railroad company, the latter in furnishing the cars, which was a matter devolving exclusively on it, was bound to use ordinary care to furnish such as were reasonably safe for the quarry owner and his servants. *Ib.*
11. ———: INDEPENDENT CONTRACTOR. An employer is not responsible for the negligence of a contractor or his servants where such contractor is given entire freedom in the use of means to accomplish the result. *Ib.*

12. ——— : ———. Where the employer, however, reserves the right to direct the manner of performance in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and his employes the exercise of care in that regard. *Ib.*
13. ———. A car with defective brakes is not such an imminently dangerous instrument as to render the railroad company liable to one injured thereby in the absence of any contractual or other relationship. *Ib.*
14. ——— : QUESTION FOR JURY. Where on the issue of contributory negligence fair-minded and sensible men may differ in their conclusions, the question is one for the jury, and this is true although there is no dispute as to the facts. *Ib.*
15. CONTRIBUTORY NEGLIGENCE : DEFECTIVE CAR. Where one to whom a railroad company owes the exercise of due care is furnished with a car having a defective brake and is injured thereby, he cannot recover for such injury, if he knew that defective and dangerous cars were frequently left by the company for his use and could have ascertained by reasonable care on his part the defect in the car causing the injury. *Ib.*
16. ——— : QUESTION FOR JURY. Whether the plaintiff was guilty of contributory negligence in not exercising reasonable care to ascertain the condition of the car was a question for the jury. *Ib.*
17. EMINENT DOMAIN : CONDEMNATION FOR RAILROAD : DAMAGES. The damages to be paid for land condemned for railroad purposes and on which the owner has a coal mine and appliances should be a compensation for the whole of the property as it remained at the time the appropriation was made in view of the uses to which the land appropriated was to be applied. *The Chicago, S. F. & C. Ry. Co. v. McGrew*, 282.
18. ——— : ——— : PECULIAR BENEFITS. Any benefits the construction and operation of the railroad would add to the property not taken, by way of increased facilities for marketing coal, should be deducted from the damages, but such benefits should be peculiar to the property on account of the uses made of it. *Ib.*
19. ——— : ——— : DAMAGES TO COAL MINE. The damages assessed should not be confined to the surface of the land and the machinery in use in the business, but should also apply to the internal arrangements of the mine and the appliances therein provided for its economical and successful operation and to all the external arrangements which add to its value. *Ib.*
20. ——— : ——— : ——— : RAILWAY CONNECTION. The facilities for the transportation of coal and railway connection with the mine is a valuable property right which belongs to the owner of the land, and, if injured by the appropriation of the land, such injury will constitute a damage to the remaining property for which compensation should be made, although the railroad switches and tracks making the connection with the mine belonged to the railroad company. *Ib.*
21. CONDEMNATION FOR RAILROAD : COAL MINE : AVERTING DAMAGE. The damages should be estimated as of the date of the assessment by the commissioners, and on the assumption that defendant had adjusted or would adjust his property to its changed condition so soon as it could be reasonably done, and in such manner as to avert all damages that could be avoided by reasonable care and expense. *Ib.*

22. ——— : ——— : ———. If the business of defendant as a miner of coal was necessarily interrupted by reason of the appropriation of a part of his land, compensation should be allowed for the reasonable value of the use of the mine during the period of such necessary interruption. *Ib.*
23. ——— : ——— : ———. Where a railroad company condemns a right of way across the owner's lot in such a way as to separate his engine from his mining shaft and machinery at the pit top, it is proper for the jury in estimating the depreciation of the value of the property to take into consideration the number and speed of passing trains, the danger of accidents to defendant's employees and the risk of fires. *Ib.*
24. ——— : ——— : ———. The connection of the mine with a railroad other than plaintiffs is a valuable property right, and if necessary changes and readjustment of engine, shaft and other appliances rendered it necessary to change the railroad connection the reasonable expense of the same should be allowed in estimating damages. *Ib.*
25. ——— : ——— : ———. Where it becomes necessary to wholly abandon the shaft because of the condemnation, its value should be allowed in estimating damages and not the expense of making a new one. *Ib.*
26. ——— : ——— : ———. It is not error to instruct the jury, if the appropriation of the right of way has entirely cut off defendant's connection with the other road and so prevented the operation of the mine, defendant is entitled to damages from the loss of business from the filing of the commissioners' report to the completion of plaintiff's road. *Ib.*
27. ——— : ——— : ———. The defendant is entitled to compensation in money and cannot be required to accept in lieu thereof licenses and privileges to go upon and use the right of way or a release of part of it. *Ib.*
28. ——— : ——— : ———. Where the switch, chute, pit top and other connections of the mine are not actually taken though they may have been rendered valueless for the purpose for which they were designed, it does not follow that they have become valueless for all purposes, and it is erroneous to instruct the jury to allow damages to the extent of their full value instead of their depreciation in value. *Ib.*
29. ——— : ——— : ———. Since plaintiff had a right to show that the value of the property was not totally destroyed, but that the mine could still be operated, an instruction that plaintiff, after taking defendant's property, could not insist upon his using the strip taken, either by a superstructure or by means of a subterranean device or by any other means which tended to increase the dangers to his employees or the inconveniences or dangers of operating the shaft which would make it difficult to get careful and prudent men to work in the mine, was misleading. *Ib.*
30. STREET RAILWAY : ABUTTING OWNERS : COMPENSATION. A street railway properly constructed and lawfully authorized does not impose such a new burden as to entitle an adjacent owner of property to compensation therefor. *Ransom v. The Citizens' Ry. Co.*, 375.
31. ——— : CONSTRUCTION OF FRANCHISES. Grants of rights in streets are not to be extended by construction beyond the reasonable meaning of the language in which they are expressed. *Ib.*

32. ——— : ——— : DOUBLE TRACK. A municipal ordinance construed to authorize the substitution by the street railway company of a double track for a single track. *Ib.*
33. ——— : ——— : ———. If a street railway company has the authority to build a line of single or double track, the construction of a single track does not exhaust the power or preclude a later change to a double track when the business demands it. *Ib.*
34. NEGLIGENCE : RAILROAD : RINGING BELL : ORDINANCE. The failure to ring a bell on a moving railroad engine as required by a city ordinance constitutes negligence. *Hanlon v. The Mo. Pac. Ry. Co.*, 381.
35. ——— : ——— : ——— : ———. Such negligence alone will warrant a recovery when it appears that obedience to the requirements of the ordinance would have prevented the injury sued for, but not otherwise. *Ib.*
36. ——— : RINGING BELL : QUESTION FOR JURY. Whether or not the bell was being rung at the time of the accident is, where the evidence is conflicting, a question for the jury. *Ib.*
37. ——— : PREVENTION OF INJURY : QUESTION FOR JURY. Whether the injury might have been prevented had the bell been rung was also a question for the jury. *Ib.*
38. ——— : HIGHWAY : RAILROAD AND TRAVELER. A traveler and a railroad company when using a public highway in common must each look out for the presence of the other ; one to avoid being injured, and the other to avoid inflicting injury. *Ib.*
39. RAILROAD : TRAVELER : RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE. While such traveler riding on a wagon on the track is guilty of negligence in not looking back for a colliding train, still his negligence will not prevent recovery on his part if the servants of the company in charge of the train saw, or, by the use of proper care, might have seen, the peril to which the traveler was exposed, and thereafter could have avoided the injury and failed to do so. *Ib.*
40. NEGLIGENCE : PLEADING : EVIDENCE. The charge in the petition of negligent management of the train will authorize proof of negligence of the company after its employees saw the peril to which plaintiff was exposed.
41. ——— : INJURY CAUSING DISEASE : QUESTION FOR JURY. Where, in an action for personal injuries caused by the negligence of a railroad, the physician who examined plaintiff after the accident testified that he found evidence of compression of the chest and pneumonia arising from the compression which involved both lungs, and where it appears that the malady from which plaintiff suffered both before and at the trial was superinduced by the pneumonia arising from the injuries, such evidence was sufficient to authorize the finding of the jury that plaintiff's malady was caused by the injuries received in the accident. *Ib.*
42. ——— : PERSONAL INJURIES : DAMAGES : VERDICT. Where the evidence in such action tended to show that plaintiff was confined to his house three weeks after the accident, that both of his sides were compressed, that pneumonia resulted, that up to the time of the trial he was unable to work and suffered continual pain, and, also, that the injury might be permanent, a verdict of \$5,000 will not be set aside by the supreme court as excessive. *Ib.*

48. ——— : ——— : ——— : ———. The question of the amount of the verdict is peculiarly one for the jury and the supreme court will not interfere with it on the ground of excessiveness, unless it clearly appears that such verdict was the result of improper motives or conduct on the part of the jury. *Ib.*
44. ——— : FELLOW SERVANTS. A master is not liable to his servant for damage resulting from the negligence of his fellow servant in the course of their common employment, unless the servant causing the injury is incompetent to discharge his duty, and the master knew of the incompetency. *Higgins v. The Mo. Pac. Ry. Co.*, 413.
45. RAILROAD : FELLOW SERVANTS. An engineer and laborer on a railroad construction train are fellow servants where they work under the same conductor, derive their authority and compensation from the same common source, and are engaged in the same general business, though in a different grade of the common service. *Ib.*
46. MASTER AND SERVANT : ORDINARY RISKS : RAILROAD. When a railroad company is in the habit of receiving and transporting cars laden with timbers and iron rails projecting over the laden cars, the risk arising therefrom is the ordinary one assumed by a brakeman engaged in the company's service. *Jackson v. The Mo. Pac. Ry. Co.*, 448.
47. ——— : ——— : ———. Nor is the foregoing rule inapplicable because the company's train dispatcher directed the brakeman to go with a locomotive and tender on a sidetrack on which the dangerous car stood and with which the tender collided, thereby causing the injury, it not appearing what the duties of the train dispatcher were, nor that he knew of the location of the dangerous car on the sidetrack, or of its being laden with projecting rails. *Ib.*
48. NEGLIGENCE : DEATH : EXTRA TERRITORIAL FORCE OF STATUTE. A resident of Missouri was killed in Kansas by the negligent acts of a railroad company, in whose service he was engaged, under such circumstances as would have entitled his widow to recover under the second section of our damage act, if the accident had occurred in Missouri. The Kansas statute provides that "when the death of one is caused by the wrongful act or omission of another the personal representatives of the former may maintain an action therefor. * * * The damages cannot exceed \$10,000, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." *Held* that the widow could not recover in an action in Missouri though no administrator could be appointed in Kansas, because the deceased left no estate there, and though the action could be brought in either state by an administrator appointed in Missouri. *Oates v. The Union Pac. Ry. Co.*, 514.
49. RAILROAD : NEGLIGENCE : PETITION. A petition in an action against a railroad for the death of a person by its negligence is sufficient which avers in substance that the defendant by its servants while running a locomotive and train of cars over its road, did so carelessly and negligently manage and conduct the same that it ran against, struck and fatally injured the deceased. *Shaw v. The Mo. Pac. Ry. Co.*, 648.

50. ——— : ——— : TRESPASSER ON TRACK. The servants of a railroad company owe to a trespasser on its trestle only the duty, so soon as he is discovered on the track, of promptly using all efforts within their power, consistent with the safety of the train and of those upon it, to avoid injuring him. *Ib.*
51. THE EVIDENCE in this case examined and the action of the trial court in sustaining a demurrer to plaintiff's evidence sustained. *Ib.*

RAPE.

1. RAPE, ASSAULT TO COMMIT : VIOLENCE. It is not necessary to constitute an assault with intent to rape that actual violence should have been used. *State v. Shroyer*, 441.
2. ——— : ———. It is not even necessary that the person of the one upon whom the attempt is intended should be touched. If the intent with the present means of carrying it into effect exists and preparations therefor have been made the assault is complete. *Ib.*
3. ——— : ———. It is immaterial in such case whether the sexual connection was to be accomplished by actual physical force or while the victim was asleep. *Ib.*
4. ——— : EVIDENCE : REPUTATION OF DEFENDANT. Where a defendant in such case testifies in his own behalf, his general reputation for virtue and chastity may be assailed by the state. *Ib.*

RATIFICATION.

See PRINCIPAL AND AGENT, 6.

RECEIVER.

1. PRACTICE : CHANGE OF VENUE : RECORD PROPER : RECEIVER. Applications for changes of venue are not a part of the record proper, and the ruling of the trial court thereon will not be reviewed, unless exceptions are saved and the matter is brought to the attention of the trial court in the motion for a new trial. A like rule is applicable to the action of the court in the appointment of a receiver. *Wolff v. Ward*, 127.
2. ——— : FORECLOSURE OF MORTGAGE : RECEIVER. The court in a suit in equity to foreclose a mortgage has the power to appoint a receiver to manage the property, where the defendant is insolvent and the property is insufficient to pay the debt. *Ib.*

RELEASE OF DEBT.

See DEBTOR AND CREDITOR, 4, 5, 6.

REMAINDERS.

1. VESTED REMAINDER. A vested remainder is a fixed interest to take effect in possession after a particular estate has expired. *Rodney v. Landau*, 251.
2. ——— : CONTINGENT REMAINDER. The vested or contingent character of the remainder is determined not by the uncertainty of enjoying the possession, but by the uncertainty of the vesting of the estate. *Ib.*
3. ———. The remaindermen are vested ones when they are ascertained, and are to take and enjoy the possession immediately on the death of the life-tenant. *Ib.*

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RESCISSION.

See SALE, 8.

RESIGNATION.

See OFFICES AND OFFICERS, 1, 2.

ROBBERY.

1. CRIMINAL LAW : INDICTMENT : ROBBERY IN FIRST DEGREE. It is not necessary to allege, in an indictment for robbery in the first degree, that the putting in fear was done feloniously. *State v. Brown*, 365.
2. CRIMINAL PRACTICE : INSTRUCTIONS : ROBBERY. It is error for the court to omit the element of felonious intent in its instructions on robbery in the first degree. *Ib.*
3. ——— : ——— : ——— : FELONIOUSLY. It is not necessary to use the word "feloniously" in the instructions, but, if used, its meaning should be defined. *Ib.*
4. ——— : ——— : FELONIOUSLY ROBBERING. To "feloniously rob" means the taking or removing the money or property of another, *animo furandi*. *Ib.*
5. ——— : ROBBERY IN FIRST DEGREE : INSTRUCTION. An instruction on robbery in the first degree properly stated. *Ib.*
6. ——— : ——— : ABETTOR. It is not essential to the conviction of one as an aider or abettor of robbery in the first degree that he received some of the stolen property. *Ib.*
7. ——— : PETIT LARCENY. It is not error for the court, on a trial for robbery in the first degree, to omit to instruct as to petit larceny, where the evidence shows either robbery in the first degree or defendants' innocence. *Ib.*

SALE.

1. SALE : PAYMENT OF PURCHASE PRICE : DELIVERY OF POSSESSION. On a sale of mules the vendor receiving a small sum of money at the time and a draft for the balance of the purchase price on certain commission merchants to whom he consigned the animals, to be by them delivered to the vendee on payment of the draft and not before, the possession would remain in the vendor and his agents until the purchase price was paid. *Bergeman v. The Indianapolis & St. L. Ry. Co.*, 77.
2. ——— : ——— : ———. The retention of the bill of lading by the vendee and the forwarding of the same with the draft to the consignees, of themselves, sufficiently indicated the intention of the vendor to retain the possession and control of the mules until payment of the draft. *Ib.*
3. ——— : FRAUD : RESCISSION BY VENDOR : RIGHT OF STOPPAGE IN TRANSITU. A vendor who by the contract of sale is to keep the possession of the property sold, until the purchase price is paid, has the right, where the vendee gets possession by improper means, making it tortious, to retake the property and place himself in the position where the contract left him, and this he may do without restoring to the vendee a part of the purchase price paid at the time of the sale. *Ib.*

4. ——— : ——— : ——— : ——— : STATUTE. Section 2505, Revised Statutes, 1879, has no application to a case where a vendee fraudulently obtains possession of personal property sold before payment of the purchase price and sells it to a third party to whom it is consigned, and the original vendor exercises his right of stoppage *in transitu*, where the contest is between the last purchaser and the carrier for the value of the property which it failed to deliver. *Ib.*
5. ——— : DELIVERY : STATUTE. The latter clause of section 2505, Revised Statutes, 1879, has no application to a sale of personal property where possession was never given to the vendee. *Ib.*
6. ——— : PRINCIPAL AND AGENT : FRAUD : EVIDENCE. Evidence that an agent, who bought property from one who had fraudulently obtained possession of it under a contract of purchase, was an old acquaintance of his vendor, that the conduct of the sale was unusual, that the payment by the agent was not according to the usual custom, that when charged with knowledge of the fraud he made no denial, and that, although present at the trial, he was not called as a witness, will justify the submission to the jury of the question whether the agent knew of the fraud. *Ib.*
7. ——— : ——— : ——— : NOTICE. Where the only right a vendor has to the possession of the property sold is a statement fraudulently obtained, knowledge by the agent of the buyer that this statement was false, will prevent his principal from being an innocent purchaser. *Ib.*
8. DEED OF TRUST : SALE : TITLE OF PURCHASER. A sale by a trustee under the power conferred by a deed of trust, whether the sale be valid or invalid, vests in the purchaser the title of the *cestui que trust*. *Wolff v. Ward*, 127.
9. ——— : ———. A sale under the naked power contained in a deed of trust must be made in strict compliance with the terms and conditions prescribed in the deed. *Ib.*
10. ——— : SALE, CHANGE OF TIME OF : NOTICE. Where the day of sale of property advertised to be sold under a deed of trust is changed, the notice of sale must be published for the full time required by the terms of the deed of trust, after such change is made. *Ib.*
11. MORTGAGE : NOTICE OF SALE. A mortgagee, whether directed or not by the mortgage, should give notice of sale by him. *Snell v. Harrison*, 158.

See TAX SALE.

SEDUCTION.

1. CRIMINAL LAW : SEDUCTION UNDER PROMISE OF MARRIAGE : CORROBORATING EVIDENCE. On a trial of an indictment for the seduction of a woman under promise of marriage, she must, under Revised Statutes, 1879, section 1912, be corroborated as to the promise by other evidence than that given by herself. *State v. McCaskey*, 644.
2. ——— : ——— : GOOD REPUTE. The duty is on the state in such case to allege and prove that she was a woman of good repute. *Ib.*

SEPARATE ESTATE.

See MARRIED WOMEN, 1, 2, 3, 4, 5, 12, 13, 14.

SET-OFF.

1. **ASSIGNMENT FOR BENEFIT OF CREDITORS : SET-OFF.** In a suit by an assignee for the benefit of creditors for a debt due the assignor, the defendant cannot set off payments made by him after the assignment as surety for the assignor, though the payments were made on debts which were past due when the assignment was executed. *Huse v. Ames*, 91.
2. ——— : ———. A defendant's equitable set-off, to be available, must in such case exist at the time of the assignment. *Id.*

SPECIAL LAW.

See CONSTITUTIONAL LAW, 6.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE : PARTIES. The infant heirs of one charged to have agreed to convey land are necessary parties to an answer in ejectment setting up such contract and asking specific performance. *Rogers v. Wolfe*, 1.

SPOILIATION.

OFFICIAL BOND : ERASURE OF NAME OF SURETY : SPOILIATION. The mutilation of the official bond of a county officer by the fraudulent erasure of a name of a surety, after the bond had been signed, delivered and approved by the county court, will constitute no defense to a suit on the bond, since the erasure could not be made by the county, and if made by the surety himself, some county officer, or any third person, it would be only spoliation, and would not affect the validity of the bond nor relieve the principal or any surety from liability thereon. *The State ex rel. Pemiscot Co. v. Scott*, 26.

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STREET RAILWAYS.

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TAXATION.

1. CONSTITUTION: EXEMPTION FROM TAXATION: STATUTE. Under the state constitution, as it existed in 1853, the legislature could exempt the property of a college "from the payment of taxes for state or county purposes so long as the same or the proceeds thereof shall be used for or applied to educational purposes." (Acts, 1853, p. 569.) *The President & Faculty of St. Vincent's College v. Schaefer*, 261.
2. CONTRACT: EXEMPTION FROM TAXATION: CONSTITUTION. Such exemption constitutes a contract on the part of the state which, in the absence of a reserved right to do so, it cannot abrogate. *Ib.*
3. ———: ———: CONSIDERATION. The benefit which the legislature deemed the state would derive from the passage of the act constituted a sufficient consideration for the contract, and no other is required to support it. *Ib.*
4. ———: ———: VARIANCE IN NAMES. An immaterial variance between the name of the corporation in the law creating it and the name as used in the act of exemption from taxation will not affect the validity of the latter act. *Ib.*
5. BACK TAXES: DOWER. A sale under a judgment for delinquent taxes does not bar a widow's right of dower where she was not made a party to the tax suit, and this is true although such right of dower is only inchoate. *Blevins v. Smith*, 583.

TAXES.

See DISTRESS WARRANT.

TAXATION.

TAX SALE.

TAX DEED.

See DEEDS, 10, 11, 12, 13, 14.

TAX SALE.

1. **TAX SALE: ASSIGNEE OF PURCHASER: DEED: STATUTE.** The revenue act of 1872 (2 Wag. Stat., pp. 1205-6, sec. 207) makes certificates of purchases at tax sales assignable "by indorsement thereon under the hand of the purchaser. Section 216 authorizes the collector to make a deed to the assignee, but requires the deed to recite the fact of the assignment; and section 217 prescribing the form of the deed requires a recital that the indorsement was under the hand of the purchaser written on the back of the certificate of purchase. *Held* that a deed simply reciting that the purchaser had assigned to the grantees all his "right, title and interest in and to said land" was void because not substantially complying with the statute. *Pitkin v. Reibel*, 505.
2. ———: **SUCCESSFUL CLAIMANT: REIMBURSEMENT OF TAXES PAID.** Recovery can be had for taxes paid, by an assignee or person claiming under the purchaser at the tax sale, under section 219 of said act of 1872, which provides that if the holder of a tax deed or one claiming under him by virtue thereof be defeated in an action for the recovery of the land he may recover of the successful party "the full amount of the taxes paid by the tax purchaser at the time of the purchase and all the subsequent taxes paid by him," interest, etc. *Ib.*
3. ———: ———: ———. Though the tax deed is insufficient to transfer title, still it is sufficient evidence of the assignment to enable the grantee to recover the taxes paid. *Ib.*
4. ———: **NOTICE: CITY CHARTER.** Where a city charter requires the collector to post written notices of tax sales, he may do so by his deputy. *Lynch v. Donnell*, 519.
5. ———: ———: ———. The certificate of the collector need not show that the notice of sale remained posted up for three weeks, under a provision of the charter requiring the collector to file with the auditor a certificate that the notice "had been posted in the four most public places in the city, at least three weeks before the sale." *Ib.*
6. ———: ———: ———. The "four most public places in the city," at which the notices were required to be published, were matters for the judgment of the collector, and this is true, although the city council had passed an ordinance on the subject. *Ib.*
7. ———: **ADJOURNMENT: THANKSGIVING DAY.** A provision in the city charter directing the collector "to continue the sale from day to day between the hours of ten o'clock and five o'clock in the afternoon, as long as there are bidders, or until the taxes are paid," does not prevent the collector from adjourning the sale over Thanksgiving day. *Ib.*

TENANTS IN COMMON.

TENANTS IN COMMON: PURCHASE OF OUTSTANDING TITLE. While one tenant in common cannot buy in an adverse paramount title so as to oust his cotenant, yet it seems the foregoing rule is not applicable where the tenant buys in the independent interest of another tenant in common similarly situated as himself. *Snell v. Harrison*, 158.

TITLE OF ACT.

See CONSTITUTIONAL LAW, 5.

TRADE-MARKS.

1. **TRADE-MARKS.** A person has a right to the exclusive use of marks, forms or symbols appropriated by him for the purpose of indicating the true origin or ownership of an article manufactured by him. *Liggett & Myers Tobacco Co. v. Sam. Reid Tobacco Co.*, 53.
2. ———. Such designs or symbols are, however, not to be used for the simple purpose of naming or describing the quality or the goods. *Ib.*
3. ———: **INFRINGEMENT: INJUNCTION.** One who has appropriated a trade-mark has a property right in it which will be protected against infringement by injunction. *Ib.*
4. ———: **CASE STATED.** Plaintiff had, for many years, made tobacco, to each plug of which is attached six five-pointed stars made of tin with a hole in the center. After its tobacco had become well known as the "Star" brand, defendant put on the market a "Buzz-saw" tobacco, to which is attached a tin symbol of the same size as the plaintiff's with eight points, slightly inclined to the right, a hole in the center and the words "Buzz" dimly impressed on the surface. It is attached to the plug the same as the star of the plaintiff. *Held*, that the "Buzz-saw" symbol was an infringement of plaintiff's trade-mark, and that its use should be enjoined. *Ib.*

TRESPASS.

DELINQUENT COUNTY COLLECTOR: DISTRESS WARRANT: TRESPASS. The issuance of a distress warrant under any other circumstances than those authorized by statute will make the officer issuing it a trespasser. *Judson v. Smith*, 61.

TRUSTS AND TRUSTEES.

1. **CORPORATION: PROMOTERS: TRUST AND CONFIDENCE.** Persons, usually called promoters, who project and form a corporation by soliciting and procuring others to subscribe for and take shares of stock for the purpose of selling to the corporation property which they own or have a right to acquire by executory contract, occupy a position of trust and confidence, and it devolves upon them to make full disclosures of their interest in and relation to the property. *The South Joplin Land Co. v. Case*, 572.
2. ———: ———: ———. Where the promoters form such association or initiate its formation, from that time they stand in a confidential relation to each other and to all others who may subsequently become members or subscribers, and it is not then competent for any of them to purchase property for the purpose of such a company and sell it at an advance without a free disclosure of the facts. *Ib.*

UNDUE INFLUENCE.

See **FRAUD**, 7.

VARIANCE.

See **CONTRACTS**, 11.

PRACTICE, CRIMINAL, 13.

VENUE.

1. PRACTICE: CHANGE OF VENUE: RECORD PROPER: EXCEPTIONS. Applications for changes of venue are not a part of the record proper, and the ruling of the trial court thereon will not be reviewed, unless exceptions are saved and the matter is brought to the attention of the trial court in the motion for a new trial. *Wolff v. Ward*, 127.
2. ———: CHANGE OF VENUE. Whether or not an application for a change of venue asked eight or ten days after knowledge of the cause thereof came to the appellant is timely made, rests largely in the discretion of the trial judge. *Ib.*
3. ———: ———. An application for a change of venue because of the prejudice of the inhabitants of the county is properly overruled where the case is one in equity, triable by the court. *Ib.*

VERDICT.

1. VERDICT: EXCESSIVE DAMAGES, PRACTICE IN SUPREME COURT AS TO. The supreme court will not, because the damages awarded by the verdict of a jury are excessive, indicate a sum to be remitted so that on such *remittitur* being entered judgment may be affirmed as to the residue. *Gurley v. The Mo. Pac. Ry. Co.*, 211.
2. ———: ———. Such excessive verdict will not be disturbed by the supreme court, unless, on its face, it appears to be the result of passion or prejudice, and where it does so appear to be the result of passion or prejudice it will be set aside entirely. *Ib.*
3. NEGLIGENCE: PERSONAL INJURIES: DAMAGES: VERDICT. Where the evidence in an action for damages tended to show that plaintiff was confined to his house three weeks after the accident, that both of his sides were compressed, that pneumonia resulted, that up to the time of the trial he was unable to work and suffered continual pain, and, also, that the injury might be permanent, a verdict of \$5,000 will not be set aside by the supreme court as excessive. *Hanlon v. The Mo. Pac. Ry. Co.*, 381.
4. ———: ———: ———: ———. The question of the amount of the verdict is peculiarly one for the jury, and the supreme court will not interfere with it on the ground of excessiveness, unless it clearly appears that such verdict was the result of improper motives or conduct on the part of the jury. *Ib.*

VESTED REMAINDER.

See REMAINDERS, 1, 2, 3.

VESTED RIGHT.

See CONSTITUTIONAL LAW, 4.

WAIVER.

1. ERROR: WAIVER. A party not appealing cannot complain of error. *Rogers v. Wolfe*, 1.
2. PRACTICE: DISQUALIFICATION OF WITNESS: WAIVER. Where a party to a suit is disqualified to testify, the taking of his deposition by the adverse party constitutes a waiver of his incompetency but, if such waiver is relied upon as entitling him to testify, it should so be suggested to the trial court. *Tomlinson v. Ellison*, 103.

3. BILL OF EXCEPTIONS: SEAL: JOINDER IN ERROR: WAIVER. A bill of exceptions need not be sealed, and if so required an objection for that reason after joinder in error comes too late. *Snell v. Harrison*, 158.
4. PRACTICE: ISSUE OF FACT OR LAW: WAIVER. When a party by instructions has submitted an issue to the trial court as one of fact, he cannot, on appeal, maintain that it should have been treated as an issue of law. *Ellis v. Harrison*, 270.
5. ———: AMENDED PETITION: DEPARTURE: WAIVER. Where a defendant files an answer to an amended petition changing the cause of action from the original one, and goes to trial on the merits, he cannot, after a new trial has been awarded, object to another amended petition on the ground of its being a departure from the original one. *Spurlock v. The Mo. Pac. Ry. Co.*, 658.

WILLS.

WILLS, RECORDING OF: NOTICE: STATUTE. The question of notice, under Revised Statutes of 1879, section 3991, requiring a will devising lands to be recorded in each county in which the land lies, can arise, if at all, only where there are adverse claimants under the same grantor. *Rodney v. Landau*, 251.

WRIT OF ERROR.

See PRACTICE, CIVIL, 85, 86.

RULES FOR THE GOVERNMENT
OF THE
SUPREME COURT OF MISSOURI,

Adopted at the April Term, 1891.

Chief Justice, his duty.

RULE 1. The Chief Justice shall superintend matters of order in the court room.

Motions to be written, signed and filed.

RULE 2. All motions in a cause shall be in writing, signed by counsel and filed of record.

Argument of motions.

RULE 3. No motion shall be argued unless by the direction of the court.

Diminution of record, suggestion after joinder in error.

RULE 4. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Application for certiorari.

RULE 5. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

Reviewing instructions.

RULE 6. For the purpose of reviewing the action of the trial court, in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts

the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Bill of exceptions in equity cases.

RULE 7. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further, that parol evidence may be reduced to a narrative form where this can be done and at the same time preserve full force and effect of the evidence.

Presumption in support of bill of exceptions.

RULE 8. The only purpose of a statement, in a bill of exceptions, that it sets out all the evidence in a cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Making up transcripts.

RULE 9. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (*e. g.*): "Summons issued October 2, 1891, executed October 5, 1891," and, if any pleading be amended, the clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading as part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript

any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

Words appellant and respondent, what they include.

RULE 10. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff and defendant in error and other parties occupying like positions in a cause.

Abstracts in lieu of transcript, when filed and served.

RULE 11. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least sixty days before the cause is set for hearing, and shall in like time file ten copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least thirty days before the cause is set for hearing, and within like time file ten copies thereof with the clerk of this court. Objections to such complete or additional abstract shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant and a copy of such objections shall be served upon the appellant in like time.

Abstracts, when filed and served.

RULE 12. In all cases where a complete transcript is brought to this court in the first instance, the appellant shall deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing and

file ten copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Abstracts, what they shall contain.

RULE 13. The abstracts mentioned in rules 11 and 12 shall be printed in fair type, and shall be paged, and shall have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made over the pleadings or as to the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of all the assigned errors.

Printed transcripts.

RULE 14. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record; and in all cases 10 printed and indexed, uncertified copies of the entire record, filed and served within the time prescribed by these rules for serving abstracts shall be deemed a full compliance with said rule and dispense with the necessity of any further abstracts.

Briefs, what to contain and when served.

RULE 15. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last-named date, and the appellant shall deliver a copy of his brief in reply

to the opposing party not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last-named date.

All briefs shall be printed and shall contain, separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct.

In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, section, paging or side paging shall be set forth.

Failure to comply with rules 11, 12, 13 and 15.

RULE 16. If any appellant in any civil cases shall fail to comply with rules, numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of the respondent continue the cause at the costs of the party in default.

Costs, when allowed for printing abstracts and record.

RULE 17. Costs will not be allowed either party for any abstract, filed in lieu of a full transcript under section 2253, Revised Statutes, 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order or decree instead of a full transcript, and in which the appellant shall file in this

court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

In any case in which a manuscript record has been or may be filed in this court a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within 10 days after service of notice of the amount of such charge.

Service of abstracts and briefs.

RULE 18. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Taking record from clerk's office.

RULE 19. No member of the bar shall be permitted to take a record from the clerk's office without the written permission of some judge of the court; provided, any enrolled attorney may withdraw the record in any cause in which he is counsel for the purpose of having the same printed in full by filing with the clerk of this court the written consent of the adverse party or his attorney and also a receipt, agreeing to return such record within the time to be named therein.

Motions for rehearing.

RULE 20. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an

express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel.

Extension of time.

RULE 21. That hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Notice to adverse party.

RULE 22. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall, on filing such motion, satisfy the court that such notice has been given.

RULE 23. A motion to transfer a cause under the provisions of the constitution from either division to court in banc must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 22.

RULE 24. All rules not included in the foregoing enumeration are hereby rescinded.

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